A TREATISE

ON

THE AMERICAN LAW

OF

REAL PROPERTY.

BY

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1. Another quality of the estates which have heretofore been considered, is the circumstance that they may [*445] be affected by * some condition upon or by which they may commence, be enlarged, or defeated. Thus an estate in fee or for life, for instance, may be qualified in this way; and when treating of this subject, it is only necessary to keep in mind the distinction that may exist between an estate in respect to its quantity or duration, and its qualities.[1] An estate upon condition may, in general terms, be defined to be one which may be created, enlarged, or defeated, by the happening or not happening of some contingent event.[2] A condition is a qualification or restriction annexed to a conveyance, and so united with it in the deed as to qualify or restrain it.[3] It cannot, however, be created by parol if the deed is absolute in its terms.[4] And the word "conditioned" in a deed may have the effect only of a restriction in the mode of using the granted premises, as where A granted land to B *conditioned* that no building other than the one described should be erected on the premises, it was held not to create an estate upon condition nor a covenant, but to limit the uses which might be made of the land. And as the grantor owned adjacent lands to the granted premises, which were to be affected by the uses made of these, it was held that the restriction barred the grantee and all persons claiming under him.[5] And where the deed, though in usual form, recited that it was understood by the parties that the premises were not to be used for any other than certain purposes expressed, as, for example, "a dépôt square," it was held to be a covenant, and not a condition.[6] But it is sometimes difficult to determine in respect to estates created by devise, whether they are estates upon condition or trusts. If it be the first, the effect of a breach of the condition is to defeat the estate, and the heirs may come in and take it with all improvements made upon it, and discharged of all intermediate charges and incumbrances. But if the limitations in the devise are to be

1 Co. Lit. 201 a. 2 Co. Lit. 201 a; 2 Flint, Real Prop. 225.
3 Laberee *v.* Carleton, 53 Me. 211.
4 Marshall, &c. School *v.* Iowa, &c. School, 28 Iowa, 360.
5 Fuller *v.* Arms, 45 Vt. 400. 6 Thornton *v.* Trammel, 39 Ga. 202.

taken as directions to trustees, explaining the terms upon which the devise is made, it will be taken to be a trust, which those who take the estate are bound to perform, and, in case of a breach, a court of equity will interpose and enforce performance, and, by thus preserving the estate, carry out the charity or bounty of the testator. And what the old law treated as a devise upon condition, courts would now, in almost every case, construe a devise in fee upon trust. And in this way, instead of the heir taking advantage of the condition, the *cestui que trust* would compel an observance of the trust. And the question of intent would be inquired into as gathered from the whole devise, although the testator may have used the word "proviso," ordinarily a word of condition, in connection with his devise.[1]

2. The condition which is to affect the estate may be express or implied, and it may be precedent or subsequent. An express condition, otherwise called a condition in deed, is one declared in terms in the deed or instrument by which the estate is created. An implied condition, or a condition in law, is one which the law implies, either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances. Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as, when they do happen, defeat an estate already vested.[2]

3. Among the forms of expression which imply a condition in a grant, the writers give the following: "on condition" — "provided always" — "if it shall so happen" — or "so that he the grantee pay, &c., within a specified time;" and grants made upon any of these terms vest a conditional estate in the grantee. And it is said other words make a condition, if there be added a conclusion with a clause of re-entry, or without such clause, if they declare that, if the feoffee does or does not do such an act, his estate shall cease or be void.[3]

[1] Stanly *v.* Colt, 5 Wall. U. S. 165; 1 Sugd. Powers, 7th Lond. ed. 123.

[2] Co. Lit. 201 a; 2 Flint, Real Prop. 227, 228; Vanhorne's Lessee *v.* Dorrance, 3 Dall. 317.

[3] Lit. §§ 328, 329, 330; Wheeler *v.* Walker, 2 Conn. 201; Com. Dig. Condition, A. 2. See also 2 Wood, Conv. Powell's ed. 505, 512, *et seq.*

If a covenant be followed by a clause of forfeiture, if it is broken it will be construed to be a condition.[1] And courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so. Where the condition was that if the grantee did a certain thing he should pay the grantor so many dollars, and then have a title to convey, and he broke the condition by failing to do the required act, but tendered the money, it was held to be a condition subsequent, which the grantee had so far performed, that the grantor's right to enter for a breach was defeated.[2] What will or will not constitute a condition in a deed is often a matter of nice construction by courts, and belongs [*446] rather to another *department of the law than that relating to the nature and incidents of estates upon condition. Words, moreover, often create a condition in a will which would not if made in a deed, as where in a will an intention is expressed in devising the land, that the devisee should or should not do certain things in respect to it, it may be construed as creating a conditional estate in him. But it is said, "if one makes a feoffment in fee" *ea intentione, ad effectum, &c.*, that the feoffor shall do or not do such an act, these words do not make the estate conditional, but it is absolute notwithstanding. And yet where the grant is expressed to be for a specific or limited purpose, the land cannot be appropriated to any other. If it is, the grantor retains sufficient interest in the subject-matter of the grant to apply to the court of chancery to restrain such diversion.[3] The grant of a lot of land to set a meeting-house thereon does not imply a condition.[4] And "an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation." Therefore, reciting in the deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture.[5] And yet these words may create a condition *if a right of re-entry is reserved* in favor of

[1] Moore *v.* Pitts, 53 N. Y. 85. [2] Board, &c. *v.* Trustees, &c., 63 Ill. 204.
[3] Warren *v.* Meyer, &c., 22 Iowa, 351.
[4] Packard *v.* Ames, 16 Gray, 325. [5] Ayer *v.* Emery, 14 Allen, 69, 70.

the grantor in case of failure to carry out the intention thus expressed.[1] And the most that is now proposed, is to illustrate by examples the several classes of conditions above enumerated. Thus, an instance of a condition precedent would be a grant to A upon his marriage. So a lease to B for ten years, and if he pay the lessor £100 by or before a certain time, that he shall have the land to him and his heirs. In the one case the deed takes effect to create, in the other to enlarge, the estate, when, and not until, the prescribed event shall have happened.[2] So where A granted land to B, reserving the pine timber thereon if he get it off by a certain time. Such parts of it as he did not get off by that time remained the property of the grantor.[3] An instance of a condition subsequent would be a grant to A and his heirs, tenants of the manor of Dale, or to B so long as she should remain a widow. The estates in these cases vest subject to be divested in the one case upon the grantee's ceasing to be tenants of Dale, and in the other upon the marriage of the grantee.[4] So a deed to one in which the grantor reserves to himself a rent, with a right to enter and defeat the estate if the rent shall be in arrear.[5] A condition annexed to a conveyance in fee that the grantee shall pay the grantor or his heirs an annual rent, and in default the grantor may enter, is a good condition.[6] In Rawson *v.* Uxbridge,[7] the devise was of land to a town for a burying-place for ever, and was held not to be a condition at common law. But in Indiana, a grant of a lot of land was made to a town "for the purpose of erecting a tan-yard on it," and was held to constitute a condition subsequent, and the vendee having erected a tan-yard upon the premises, and maintained it for twenty-four years, the title was not defeated, though he then discontinued that use of the estate.[8]

[1] 2 Wood, Conv. Powell's ed. 513, 514; Shep. Touch. 123; Rawson *v.* Uxbridge, 7 Allen, 125; Co. Lit. 204 a; Cowper *v.* Andrews, Hob. 40 a, Dyer, 138; Doct. & Stud. Dial. 2, c. 34; Supervisors, &c. *v.* Patterson, 56 Ill. 119; Waters *v.* Breden, 70 Penn. 235.

[2] 2 Flint, Real Prop. 228; Lit. § 350.

[3] Monroe *v.* Bowen, 26 Mich. 523.

[4] 2 Flint, Real Prop. 229.

[5] Lit. § 325; Waters *v.* Breden, *sup.*

[6] Van Rensselaer *v.* Ball, 19 N. Y. 100, Littleton, § 325.

[7] 7 Allen, 125.

[8] Hunt *v.* Beeson, 18 Ind. 382.

So if the supposed condition of an executed grant amounts to an agreement on the part of the grantee to do certain things, it will not be held to defeat the estate if he fails to perform. In order that the condition, in such a case, should defeat the estate, the grant must be in its nature executory.[1] But a grant upon condition that the land should be used for a specific purpose, — a school and schoolhouse, for instance, — to be forfeited if used for any other purpose, upon the grantor paying the appraised value of the buildings, was held to be a grant upon condition at common law, which the grantor or his heirs could only take advantage of by making entry after the breach. In such case, however, the grantor should offer to join with the grantee in selecting appraisers to estimate the value of the buildings and tender the appraised value; or, if the grantee declines, the grantor should cause them to be appraised and offer to pay the estimated value before he could maintain an action to recover the land.[2] If the condition requires the grantee to use the granted premises for a special purpose, and he do so, there is nothing to prevent his using it for any other purpose not inconsistent with this. Thus where the grant was of land to be used for the raceway of a mill, it was no breach of this condition that it was also used for a tow-path, or that a building encroached upon it, so long as it continued to be used as a raceway.[3] The doctrine of estates upon condition seems to have been originally derived from the feudal law, and grew out of the conditions upon which fiefs were granted. If the tenant neglected to pay or perform his service, the lord might resume his fief. It is upon this ground that conditions are held to be reserved to the grantor and his heirs only, and he and they alone can avail of the right of resuming the estate for a breach. And the grantor's remedy for such a breach is by a resumption of the estate granted.[4]

4. But it is not always easy to determine whether the condition created by the words of a devise or conveyance is precedent or subsequent. The construction must depend upon the intention of the parties, as gathered from the instru-

[1] Laberee *v.* Carleton, 53 Me. 213. [2] Warner *v.* Bennett, 31 Conn. 468.
[3] McKelway *v.* Seymour, 5 Dutch. 322. [4] Butler's note 84 to Co. Lit. 201 a.

ment and the existing facts, since no technical words are necessary to determine the question. In the case cited below, the court state as a rule, that "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent."[1]*

*5. But conditions subsequent, especially when [*447] relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly.[2] Thus where A conveyed land to B on condition that he should not convey the same, except by lease, prior to 1861. Before that time B leased it for ninety-nine years, and gave the lessee a covenant to convey the fee after that date. It was held not to be such a conveyance of the estate as to be a breach of the condition.[3] Upon these principles, where a condition

* Note. — Among the numerous cases of conditional devises and grants, A devised to B and C a certain estate, "they jointly and severally paying to E F" so much money "within ten years after testator's decease," held an estate defeasible upon failure to pay according to its terms. Wheeler *v.* Walker, 2 Conn. 196. So a grant to a religious society upon condition that it should be held for the support of a minister preaching in a certain church, standing upon a certain lot of land. The proprietors took down the church, and erected it upon another lot. This was held to work a forfeiture of the estate, by the condition subsequent being broken. Austin *v.* Cambridgeport Parish, 21 Pick. 215. So where the grant was upon condition that the public buildings of a county shall be fixed upon a part of it, and they were fixed upon another lot. Police Jury *v.* Reeves, 18 Martin, 221. See Stuyvesant *v.* The Mayor of New York, 11 Paige, Ch. 427. So a devise of land for the purpose of building a schoolhouse, provided it is built within such a distance of such an object, was held a condition subsequent. Hayden *v.* Stoughton, 5 Pick. 528.

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[1] Underhill *v.* Saratoga R. R., 20 Barb. 455. See also Barruso *v.* Madan, 2 Johns. 145; Finlay *v.* King's Lessee, 3 Pet. 346; Rogan *v.* Walker, 1 Wis. 527.

[2] Gadberry *v.* Sheppard, 27 Miss. 203; Ludlow *v.* New York and Harlem R. R., 12 Barb. 440; Merrifield *v.* Cobleigh, 4 Cush. 178, 184; Bradstreet *v.* Clark, 21 Pick. 389; M'Williams *v.* Nisly, 2 S. & R. 513; Martin *v.* Ballou, 13 Barb. 119; Hoyt *v.* Kimball, 49 N. H. 327.

[3] Voris *v.* Renshaw, 49 Ill. 432.

applies in terms to the grantee or lessee without mention of heirs, executors, or assigns, the condition cannot be broken after the death of the grantee or lessee. If heirs and executors are named, but not assigns, it will not be broken by any act of an assignee. Accordingly, where the grant of an estate was upon condition that the grantee should maintain a fence, without naming his heirs, executors, or assigns, it was held that the neglect of his heirs, after his death, to do it, did not work a forfeiture.[1]

6. Conditions may be impossible, unlawful, or incompatible with the nature of the estate to which they are annexed, and their effect is then often materially different whether they are in their nature precedent or subsequent. A condition subsequent, if it has any effect, defeats an estate already vested, but if such condition is impossible or unlawful at the time of creating the estate, or becomes impossible by the act of the feoffor or the act of God, it leaves the estate an absolute and unconditional one, since it is the condition itself that is or becomes void. Thus, if an estate be made to A. B. and his heirs, but upon the condition that unless he shall go to Rome in twenty-four hours, or marry J. S. by such a day, and she dies before that day, or the grantor himself marry her,[2] or unless the grantee shall kill a certain person, or, if the estate is a fee-simple, in case he shall ever alien it,[3] that the estate [*448] shall be defeated, the effect is to render the *estate absolute in the grantee or devisee. And this principle applies as well to estates for life or years as to those in fee. And the same would be the effect if the condition was for the exemption of the property from the ordinary incidents belonging to such property, as that it should not be liable for the debts of the grantee or devisee.[4]

[1] Emerson *v.* Simpson, 43 N. H. 475; Page *v.* Palmer, 48 N. H. 385.

[2] Hughes *v.* Edwards, 9 Wheat. 489; Taylor *v.* Sutton, 15 Ga. 103; 2 Flint, Real Prop. 232, 233; Co. Lit. 206 a; Badlam *v.* Tucker, 1 Pick. 284.

[3] Co. Lit. 206; Taylor *v.* Sutton, 15 Ga. 103; Gadberry *v.* Sheppard, 27 Miss. 203; Blackstone Bank *v.* Davis, 21 Pick. 42; Tud. Cas. 796; Brandon *v.* Robinson, 18 Ves. 429; Willis *v.* Hiscox, 4 Mylne & C. 197; Bradley *v.* Peixoto, 3 Ves. 324.

[4] Blackstone Bank *v.* Davis, 21 Pick. 42; Tud. Cas. 796; Brandon *v.* Robinson, 18 Ves. 429.

7. There may be valid conditions restricting the free conveyance of an estate even in fee, as where the grantee is not to convey it before a certain time, or is not to convey it to certain persons named.[1] Thus, though a right to have partition is an incident to a tenancy in common, if shares of an estate be conveyed to several tenants in common, and it is for the interest of all that it should remain in common and undivided, and in the deeds creating these shares a condition is inserted that the estate should be suffered to remain in common, it was held to be a valid condition.[2] So a condition in a deed that the grantee shall not use or suffer the premises to be used for the manufacture or sale of any intoxicating liquors thereon, was held to be a valid one.[3] And a devise to A until he shall become bankrupt, with a devise over upon such a contingency, would be good.[4] An estate may be settled to the separate use of a *feme covert*, with a restriction as to conveyance during coverture. But such restriction would be at an end upon her becoming discovert.[5] If the condition be in restraint of marriage, the rule seems to be this: If the condition be precedent, it must be strictly complied with in order to entitle the party to the benefit of the devise. But if the condition in restraint of marriage be subsequent and general in its character, it is treated as a mere nullity, and the estate becomes absolute.[6] But if the condition be an absolute restraint of marriage until the devisee is twenty-one years of age, it is a reasonable and therefore good condition, though subsequent, and, if violated, will defeat the estate.[7]

8. If the condition is precedent, inasmuch as the estate does not vest at all until such condition happens, the effect of its being unlawful or impossible is that the estate dependent on

[1] Attwater *v.* Attwater, 18 Beav. 330; overruling Doe *v.* Pearson 6 East, 173, in which it was held that the condition might restrict the grantee as to all persons except one. Tud. Cas. 794; Co. Lit. 223 a.

[2] Hunt *v.* Wright, 47 N. H. 396.

[3] Plumb *v.* Tubbs, 41 N. Y. 442.

[4] Lockyer *v.* Savage, 2 Strange, 947.

[5] Tud. Cas. 805.

[6] Story, Eq. §§ 288, 289; Bertie *v.* Falkland, 2 Freem. 220.

[7] Shackelford *v.* Hall, 19 Ill. 212.

it fails, and the grant or devise becomes wholly void.[1] And where a condition precedent consists of several parts united by copulative conjunction, each part must be performed before the estate can vest.[2]

9. This distinction between conditions precedent and subsequent is so important that it becomes proper to resume, in this connection, the consideration of the distinction between these classes of conditions, which can best be illustrated by examples. Thus, where there was a devise of lands to A and B, after the death of the testator's wife, if they should [*449] continue to live with *her and be bound to her as servants until they were married, and the wife was unable to receive and take charge of them, and left the State without taking them with her, and died in another State, it was held, that as the provision was for the testator's wife, and as she by her act prevented the performance of the condition, it became an impossible one, and the devisees took the estate. Here the court must have regarded this condition as a subsequent one, which was to defeat, and not to create, an estate.[3] So where a devise to A. B. was upon condition that he took the name of the devisor, and took a certain prescribed oath, this was held to be a condition subsequent.[4] So in a devise to W. K., a condition for his marriage to a daughter of W. T., and a devise over to any child, &c., in case such marriage did not take place, was held to be a condition subsequent. The court, in giving their opinion in this case, state certain general principles which may aid in determining questions arising under the construction of devises. Thus, if an estate is devised upon condition, and no time is limited in which it is to be performed, the devisee has the term of his life in which to perform it. Again, if the devise be in words in the

[1] Co. Lit. 206; Id. 218 a; Vanhorne's Lessee *v.* Dorrance, 2 Dall. 317; Taylor *v.* Mason, 9 Wheat. 325; Mizell *v.* Burnett, 4 Jones, Law, 249; Martin *v.* Ballou, 13 Barb. 119; Bertie *v.* Falkland, 2 Freem. 222.

[2] Harvy *v.* Aston, Com. Rep. 731–733, s. c. 1 Atk. 374.

[3] Jones *v.* Doe, 1 Scam. 276. See United States *v.* Arredondo, 6 Peters, 691, 745; Whitney *v.* Spencer, 4 Cow. 39; Merrill *v.* Emery, 10 Pick. 507; Jones *v.* Walker, 13 B. Mon. 163; Barksdale *v.* Elam, 30 Miss. 694.

[4] Taylor *v.* Mason, 9 Wheat. 325; Marwick *v.* Andrews, 25 Me. 525; Horsey *v.* Horsey, 4 Harring. 517; Webster *v.* Cooper, 14 How. 500.

present tense, and no contrary interest appears, it imports an immediate interest, which vests in the devisee, upon the death of the testator, if no intermediate disposition is made of the estate. And a condition in such case, attached to a devise which may be performed at any time as well after as before vesting, will be regarded as a condition subsequent.[1]

10. But in a case of a conveyance upon condition, where a prompt performance thereof is necessary to give to the grantor, or the one who is to avail himself of the same, the whole benefit contemplated to be secured to him, or where its immediate fruition formed his motive for entering into the agreement, the grantee shall not have his lifetime for its performance, but must do it in a reasonable time.[2] And this doctrine of a reasonable * time for performance has been [*450] applied in a variety of cases, as where, for instance, an estate was conveyed on condition that the grantee removed a mortgage outstanding upon it, but no time was fixed in which it was to be done, it was held that the condition must be complied with in a reasonable time.[3] In a case where the grant was of a strip of land by A to a railroad company, on condition that the road was finished by such a day, it was held that a present estate passed, and that the condition was a subsequent one.[4] And where, as in the case above cited, a devise of a lot of land was made to a town upon condition that they erected a schoolhouse in a certain place, it was held that it must be done in a convenient time, or the estate would be forfeited.[5]

11. A condition in law, or one that is implied, as distinguished from an express condition, is such as is always annexed to certain estates, although not mentioned in the instruments creating them. Such, for instance, was the condition at common law annexed to every estate for life or years, that

[1] Finlay *v.* King's Lessee, 3 Pet. 374–376; Co. Lit. 208 b, 209 a.

[2] Hamilton *v.* Elliott, 5 S. & R. 375; Co. Lit. 208 b; Hayden *v.* Stoughton, 5 Pick. 528.

[3] Ross *v.* Tremain, 2 Met. 495. See Stuyvesant *v.* The Mayor of New York, 11 Paige, Ch. 425.

[4] Nicoll *v.* New York and Erie R. R., 2 Kern. 121.

[5] Hayden *v.* Stoughton, 5 Pick. 528; Allen *v.* Howe, 105 Mass. 241.

the tenant should not attempt to create a greater estate than his own; so that if such tenant enfeoffed a stranger in fee, it was a ground of forfeiture.[1]

12. A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and, until that is done, it loses none of its original qualities or incidents.[2] And any one who is interested in a condition, or in the estate to which it is attached, may perform it; and when it has once been [*451] * performed, it is thenceforth gone for ever.[3] And if a person in whose favor a condition is created once dispense with it, he cannot afterwards enter for a subsequent breach of the condition.[4] If a condition be in the alternative, the one who is to perform it may elect which to perform. But when such election is made, it fixes the rights of the parties.[5] But in respect to enforcing a condition it is often otherwise. Thus, where A conveyed parcels of land to sundry persons at different times, but inserted in the deed of each a similar condition against the use of certain trades, it was held that, though for a breach by one, no other grantee could have an action at law against him to enforce the condition, equity would enforce a performance of it.[6] So where A purchased lands, but had the deed made to B, and B sold the same to a third party, and inserted in his deed a forfeiture of the estate if the purchaser erected any thing on the granted premises which would obstruct the view from A's house, it was held to create an equitable easement of prospect constituting a condition, upon a breach of which B might enter and defeat

[1] Co. Lit. 215 a; 2 Bl. Com. 153.

[2] 1 Prest. Est. 48; Chalker *v.* Chalker, 1 Conn. 87; Canal Company *v.* Railroad Company, 4 Gill & J. 121; Phelps *v.* Chesson, 12 Ired. 194; Willard *v.* Henry, 2 N. H. 120; Winn *v.* Cole, Walker, 119; King's Chapel *v.* Pelham, 9 Mass. 501; Ludlow *v.* New York and Harlem Railroad, 12 Barb. 440; Tallman *v.* Snow, 35 Me. 342; Webster *v.* Cooper, 14 How. 501; Warner *v.* Bennett, 31 Conn. 477; Hubbard *v.* Hubbard, 97 Mass. 192.

[3] Vermont *v.* Society, &c., 2 Paine, C. C. 548; 2 Crabb, Real Prop. 815.

[4] Dickey *v.* M'Cullough, 2 W. & Serg. 100. See Dumpor's case, 4 Rep. 119.

[5] Bryant *v.* Erskine, 55 Me. 155.

[6] Barrow *v.* Richard, 8 Paige, Ch. 351. See Collins Mg. Co. *v.* Marcy, 25 Conn. 242; Parker *v.* Nightingale, 6 Allen, 341.

the estate, or A might have an injunction in his own name to prevent any such erection.[1]

13. By the common law, the only mode of taking advantage of a breach of a condition which had the effect to defeat or work a forfeiture of an estate was by an entry, upon the principle that it required as solemn an act to defeat as to create an estate. And when such entry had been made, the effect was to reduce the estate to the same plight, and to cause it to be held on the same terms as if the estate to which the condition was annexed had not been granted.[2] But where a life estate was devised upon condition that the devisee pay a certain annuity, with a limitation over after the death of the devisee for life, and the latter failed to perform, and died leaving a large sum in arrear and unpaid, it was held too late for the heirs of the testator to take advantage of the breach by making an entry, after the estate had passed by limitation into the hands of the remainder-man.[3]

14. With respect to the parties entitled to exercise this right to enter and defeat the estate of him who holds upon condition, there seems to be a difference between conditions in law and in deed. If there be a breach of the conditions in law, the lessor or his heirs, or, if he have aliened his estate, his assignee, may avail himself of the right to enter.[4] But of conditions in deed no one but he who creates the estate or his heirs, as, for instance, the heirs of a devisor, or, in case of a devise of the contingent right, such devisee or his heirs, can take advantage by entering and defeating the estate. It is a right which cannot be aliened or assigned, or pass by a grant of the reversion at common law.[5] As an example

[1] Gibert *v.* Peteler, 38 N. Y. 165.

[2] 1 Prest. Est. 48, 50; 2 Flint, Real Prop. 231; 1 Prest. Est. 46; Co. Lit. 201 a, n. 84; Walker, Am. Law, 207; Sheppard, Touch. fol. ed. 494; Co. Lit. 218 a; Sperry *v.* Sperry, 8 N. H. 477; McKelway *v.* Seymour, 5 Dutch. 329; Com. Dig. O. 6.

[3] Williams *v.* Angell, 7 R. I. 152.

[4] Co. Lit. 214; Sheppard, Touch. fol. ed. 441; 2 Crabb, Real Prop. 835.

[5] Lit. § 347; Co. Lit. 214 a, where the reason given is the avoidance of maintenance. Gray *v.* Blanchard, 8 Pick. 284. See Throp *v.* Johnson, 3 Ind. 343; Hooper *v.* Cummings, 45 Me. 359; 1 Smith's Lead. Cas. 5th Am. ed. 114; Winn *v.* Cole, Walker, 119; Cross *v.* Carson, 8 Blackf. 138; Van Rensselaer *v.* Ball, 19 N. Y. 103; Lit. § 247; Gibert *v.* Peteler, 38 N. Y. 165; Guild *v.* Richards, 16 Gray, 309.

of the indestructability of a condition when once attached to an estate, A conveyed land upon condition expressed in the deed. The purchaser gave a note for the purchase-money secured by a mortgage of the premises. The mortgagee sold the note and mortgage, and assigned the same to a third party. The condition in the deed having been broken, the original grantor entered to defeat the estate, and it was held that he might do so, and that the assignee of the mortgage took it, subject to the original condition, and liable to be defeated by a breach thereof committed or suffered by the mortgagor.[1] Nor can the benefit of a condition in a grant be reserved to any one but the grantor and his heirs; a stranger cannot take advantage of it.[2] And yet this proposition, though generally laid down in broad terms, requires certain limitations. In case of leases, the Stat. 32 Hen. VIII., c. 34, extends to assignees or grantees of the reversion the same rights of entry for condition broken as the grantor himself had.[3] And if the condition be attached to a particular estate, and the reversioner grant away his reversion, the condition is gone for ever. He could not enforce it himself, because he had parted with all his right; nor could his assignee, because the right was not assignable.[4] And, because such right is not assignable, it is universally true that a stranger cannot take advantage of a condition.[5] Such right is not a reversion, nor a possibility of a reversion, nor is it an estate in land; it is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, and not by reverter.[6] Yet by a law of Pennsylvania, it is something which may be assigned, and would pass under a sheriff's sale, and may be availed of by an assignee of the grantor.[7] The law is not

[1] Merrill *v.* Harris, 102 Mass. 328.

[2] Fonda *v.* Sage, 46 Barb. 122; Shep. Touch. 120. And this extends to cases of grants upon condition by the government. Shulenberg *v.* Harriman, 21 Wall.

[3] Nicoll *v.* New York and Erie Railroad, 2 Kern. 131; Van Rensselaer *v.* Ball, 19 N. Y. 102, 105.

[4] Hooper *v.* Cummings, 45 Me. 359.

[5] Nicoll *v.* New York and Erie Railroad, 12 Barb. 461; Norris *v.* Milner, 20 Ga. 563; Smith *v.* Brannan, 13 Cal. 107; Warner *v.* Bennett, 31 Conn. 478.

[6] De Peyster *v.* Michael, 2 Seld. 506, 507; Nicoll *v.* New York and Erie Railroad, 2 Kern. 132, 139.

[7] McKissick *v.* Pickle, 16 Penn. St. 140.

uniform as to how far a devisee of one who has granted an estate upon condition may exercise the right of defeating it by entry for a breach of the condition. In New Jersey, it has been held that by the common law heirs only, and not devisees of such grantor, or, if the grantor be a body politic, their successors only, could take advantage of the breach; neither grantees of the reversion nor remainder-men could do it, though now, by statute, devisees may there exercise the right.[1] Whereas, in Massachusetts, the devisee of such grantor, or the residuary devisee or his heir, where the conditional estate is created by devise in the same will, is held competent to enter and defeat the estate for condition broken, like an heir at common law.[2] But if the devise be to one or more heirs of an estate upon condition, without any such residuary clause, it would be for the other heirs of the devisor to enter for a breach of the condition.[3] The rule in England, as settled in the case cited below, is this: A devisee cannot avail himself of a breach of condition created by his devisor. And if there be a devise on condition to the devisor's heir at law, and the same be broken, it defeats the estate on the ground of being a conditional limitation instead of a condition at common law.[4] But where A mortgaged land to B, conditioned to support B and pay a sum of money to C, and, A having died, the estate descended to B as his heir at law, it was held to extinguish the mortgage by the merger thereby effected. But B having

[1] Southard *v.* Central R. R. Co., 2 Dutch. (N. J.) 21; Cornelius *v.* Ivins, 2 Dutch. (N. J.) 386.

[2] Hayden *v.* Stoughton, 5 Pick. 528; Clapp *v.* Stoughton, 10 Pick. 463; Brigham *v.* Shattuck, 10 Pick. 306, 309; Austin *v.* Cambridgeport Parish, 21 Pick. 215, 224. See also Webster *v.* Cooper, 14 How. 501. See, upon those points, Shep. Touch. 149; Nicoll *v.* New York & Erie Railroad, 2 Kern. 121, 131, s. c. 12 Barb. 460; Jones *v.* Roe, 3 T. R. 88; Chauncy *v.* Graydon, 2 Atk. 616, 623. The Massachusetts doctrine, that a devisee may enter for breach of condition to defeat an estate was applied to the case of an assignee of a bankrupt grantor's estate. Stearns *v.* Harris, 8 Allen, 597. And it should be understood that this apparent departure from the principle of the common law in respect to conditional estates grows out of the construction of a clause in the statute of that State (Rev. Stat. c. 101, § 4), which it is too late to controvert, however questionable that construction may originally have been.

[3] Wheeler *v.* Walker, 2 Conn. 196.

[4] Avelyn *v.* Ward, 1 Ves. Sen. 422. See also Henderson *v.* Hunter, 59 Penn. 341.

conveyed the estate to a third person by deed, in which was a recital that, as a part of the consideration, the purchaser was to perform the condition contained in A's deed to B, it was held to create no lien upon the estate, but rendered the purchaser liable in assumpsit to C for the payment of the sum originally secured in the mortgage of A to B.[1]

[*452] *15. Where the condition of a grant is express, there is no need of reserving a right of entry for a breach thereof, in order to enable the grantor to avail himself of it.[2] Nor is it necessary to name the heir of the grantor, or to reserve to him such right of entry, in order to his exercising the same in case of a breach of the condition.[3] And where a grant on condition was made to one of several sons, and, after the death of the grantor, the condition was broken, it was held that any one of these might enter and avoid the grant as to his own part of the estate.[4]

16. But nothing short of an actual entry will serve to defeat an estate upon a condition which has been broken.[5] If several parcels are conveyed, upon condition, by the same deed, or are embraced in the same mortgage and are all situate in the same county, an entry upon one in the name of the whole will be sufficient to enforce the condition as to all of the parcels. But if there be different deeds of the parcels, with different conditions therein, the entry must be made upon each.[6] It cannot be done by action, for when the grantor conveyed his estate he parted with the seisin, which he can only regain by an entry made.[7] If the grantor is himself in

1 Norris *v.* Laboree, 58 Me. 266.

2 Jackson *v.* Allen, 3 Cow. 220; Gray *v.* Blanchard, 8 Pick. 284; Lit. § 331; Osgood *v.* Abbott, 58 Me. 73, 79.

3 Jackson *v.* Topping, 1 Wend. 388; Sheppard, Touch. fol. ed. 489, where it it said, "For an heir shall take advantage of a condition, though no estate descend to him from the ancestor." Osgood *v.* Abbott, *sup.*

4 Jackson *v.* Topping, 1 Wend. 388; Bowen *v.* Bowen, 18 Conn. 535.

5 Fonda *v.* Sage, 46 Barb. 123; Osgood *v.* Abbott, *sup.*

6 Green *v.* Pettingill, 47 N. H. 375.

7 Sheppard, Touch. fol. ed. 496; Co. Lit. 218 a; Chalker *v.* Chalker, 1 Conn 79; Lincoln Bank *v.* Drummond, 5 Mass. 321; Sperry *v.* Sperry, 8 N. H. 477; Austin *v.* Cambridgeport Parish, 21 Pick. 215. Except by the technical action of ejectment where an entry is confessed. In Massachusetts, entry in case of an action to recover land forfeited is dispensed with by statute. Gen. Stat. 1860

possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after the breach, to hold, for the purpose of enforcing a forfeiture, unless he waive the breach, as it is competent for him to do, and as he may do by his acts.[1] But to have possession, in such a state of things, work a forfeiture, it must be at the election of the grantor. He is at liberty to waive the breach, and thereby save the forfeiture.[2] Where the grantor covenanted to stand seised to his own use for life, and, after his death, to the use of his son in fee, but upon condition, and the son failed to perform the condition, it was held that the grantor being in possession need not make a formal entry, or make a formal claim of the land to defeat the estate of the son.[3] Still, the entry, to be * effectual [*453] to work a forfeiture of an estate, must be made with an intention to produce that effect. And where an heir entered after a breach of condition, but declared the title under which he entered not to be that in favor of which the condition was made, it was held not to avoid the estate of the grantee,[4] though it is not necessary when making such entry to give notice to the feoffee why it is done.[5]

17. It is not necessary in order to advantage being taken of a breach of condition, that it should have caused any injury to the party who enters for that purpose. In a case already cited, the condition was that the grantee should not make a window in a certain part of the house conveyed, and before it was done the grantor had ceased to have any interest in the premises to be affected by its being opened.[6] But it was held in one case, that where the grantor of an estate upon condition, before any breach, conveyed and assigned all his property, right, claim, and demand upon the estate to a stranger, it operated to discharge the condition, and render the estate

c. 134, § 3; Phelps *v.* Chesson, 12 Ired. L. 194; Ludlow *v.* N. Y. & Harl. R. R., 12 Barb. 440; Tallman *v.* Snow, 35 Me. 342; Stearns *v.* Harris, 8 Allen, 598; Austin *v.* Cambridgeport, 21 Pick. 224.

[1] Willard *v.* Henry, 2 N. H. 120; Hamilton *v.* Elliott, 5 S. & R. 375; Andrews *v.* Senter, 32 Me. 394.

[2] Hubbard *v.* Hubbard, 97 Mass. 192; Guild *v.* Richards, 16 Gray, 317.

[3] Rollins *v.* Riley, 44 N. H. 13.

[4] Bowen *v.* Bowen, 18 Conn. 535.

[5] Hamilton *v.* Elliott, 5 S. & R. 375.

[6] Gray *v.* Blanchard, 8 Pick. 284.

absolute in the grantee upon condition, since, by such conveyance, the stranger could not acquire any right to enter for the breach of the condition.[1] Thus, where the grantor upon condition conveyed his real estate to his son, who was his heir at law, including within the description thereof the land which he had granted upon condition; the condition having been broken, the son as grantee or heir undertook to enter to defeat the estate in the first grantee. But it was held that as grantee he could not exercise the right, and that his right as heir was cut off by his father's deed, so that nothing descended to him from his father.[2] It is no valid objection to the enforcement of a forfeiture for condition broken, that the grantor may resort to an action of covenant broken for his remedy, or might enforce the performance of the condition by a process in equity. If he have alternative remedies, the court will not compel him to elect one instead of the other.[3]

18. As a condition subsequent may be excused, when its performance becomes impossible by the act of God,[4] or by the act of the party for whose benefit it is created,[5] or is [*454] prohibited or * prevented by act of the law,[6] so it may be waived by the one who has a right to enforce it. In the former case the condition is discharged altogether, and the estate made absolute; in the latter the estate is relieved from the consequence of a breach thereof. But among the circumstances which might excuse performance, the fact that one who is to do the act is a minor at the time is not a sufficient cause, since that does not render the performance impos-

[1] Underhill *v.* Saratoga & Washington R. R., 20 Barb. 455. See Sheppard, Touch. fol. ed. 501. In New York, where land is conveyed in fee, reserving the payment of rent, with a clause of forfeiture of the granted premises if the same is not paid, the grantor may have ejectment to recover the premises without a previous demand, the common law, requiring such previous demand, having been changed by statute. Hosford *v.* Ballard, 39 N. Y. 147, 152; Conger *v.* McLaury, 41 N. Y. 222.

[2] Shep. Touch. 158; 5 Vin. Abr. Condition, 5 D. 11; Perkins, §§ 830–833; Rice *v.* Boston & W. R. R., 12 Allen, 142; Hooper *v.* Cummings, 45 Me. 359.

[3] Stuyvesant *v.* The Mayor of New York, 11 Paige, Ch. 414.

[4] Sheppard, Touch. 498, fol. ed.; Merrill *v.* Emery, 10 Pick. 507; Walker, Am. Law, 298.

[5] Co. Lit. 206; Com. Dig. Condition, L. 6; 11 Am. Jur. 42.

[6] Brewster *v.* Kitchell, 1 Salk. 198; Anglesea *v.* Church Wardens, 6 Q. B. 114.

sible or unlawful.[1] But where the devise was upon condition that the devisee should pay certain legacies, and one of the legatees was absent and did not return to demand the legacy, it was held, that a neglect to pay such legacy was not a breach of the condition; performance was excused until the devisee demanded payment.[2]

19. A forfeiture may be saved though a condition may have been broken, if the party who has the right to avail himself of the same waives this right, which he may do by acts as well as by an express agreement. Thus, where the condition of a lease was that the lessee should not assign, and having done so the lessor accepted rent from the assignee, or where the condition was that the grantee should pay an annuity by such a time, which he failed to do, but subsequent to that time the grantor accepted it.[3] So where the lessor reserved the right to enter and dispossess the tenant if he failed to pay the rent at a certain time, but upon failure to make such payment the lessor sued for and recovered the same, or voluntarily accepted rent after such failure to pay.[4] The conduct of the lessor or grantor in such and similar cases is regarded as evidence of his agreement and consent, and as affirming that the estate still continues, notwithstanding the breach of the condition.[5] And where a forfeiture has been waived, a court of law will not aid in enforcing it.[6]

*20. But a mere silent acquiescence in, or parol [*455] assent to, an act which has constituted a breach of an express condition in a deed, would not amount to a waiver of a right of forfeiture for such breach.[7] Where, however, a

[1] Cross *v.* Carson, 8 Blackf. 138; Garrett *v.* Scouten, 3 Denio, 334, 340.

[2] Bradstreet *v.* Clark, 21 Pick. 389.

[3] Chalker *v.* Chalker, 1 Conn. 79; Walker, Am. Law, 299; Jackson *v.* Crysler, 1 Johns. Cas. 126; Hubbard *v.* Hubbard, 97 Mass. 192; Goodright *v.* Davids, Cowp. 805.

[4] Coon *v.* Breckett, 2 N. H. 163.

[5] Sheppard, Touch. fol. ed. 499, 500; Co. Lit. 211 b; 3 Salk. 3. But in respect to the receipt of rent being a waiver of a forfeiture for non-payment at the time it was due, there is a difference of opinion. Sutherland J. in Jackson *v.* Allen, 3 Cow. 220, held it must be rent accruing due after the breach to constitute a waiver. See also 2 Crabb, Real Prop. 840. And this seems the better doctrine. Hunter *v.* Osterhoudt, 11 Barb. 33; 3 Salk. 3.

[6] Guild *v.* Richards, 16 Gray, 326; Andrews *v.* Senter, 32 Me. 397.

[7] Gray *v.* Blanchard, 8 Pick. 284; Jackson *v.* Crysler, 1 Johns. Cas. 126.

grant to a railroad company of land was upon condition that the road should be completed by a certain time, which was not done, and after that, the grantor, knowing the fact, suffered the company to go on and incur expenses in constructing their road, and made no objection, it was held to be a waiver of the condition and forfeiture.[1] And it is laid down as a general principle, that a condition which, if taken advantage of, destroys the whole estate, if once dispensed with, in whole or in part, is gone for ever, for a condition being an entire thing cannot be apportioned except by act of law. Thus, where a grant was made to a company on condition that they should erect a *bloomery* on the estate by such a time, and the grantor afterwards waived that, and gave them permission to erect a *blast furnace* in its stead, and extended the time for its erection, it was held that a failure to erect the furnace within the extended time was not a ground of forfeiture. The condition was gone, and the terms of the grant did not create a covenant.[2]

21. Sometimes equity will relieve against the consequences of a breach of a condition, and save the estate from forfeiture. But equity never lends itself to enforce a forfeiture.[3] The proposition, it will be perceived, relates to cases where the estate has vested, and is in danger of being defeated by a failure to perform a condition subsequent.[4] And the only cases where equity interposes as to such conditions are, where the failure to perform has been the effect of accident, and the injury is capable of compensation in damages which the court have the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time.[5] But

[1] Ludlow *v.* New York and Harlem Railroad, 12 Barb. 440.

[2] Sharon Iron Co. *v.* City of Erie, 41 Penn. St. 349; Williams *v.* Dakin, 22 Wend. 209.

[3] Warner *v.* Bennett, 31 Con. 478.

[4] City Bank *v.* Smith, 3 Gill & J. 265. But *quære* as to conditions precedent, 2 Greenl. Cruise, 30; Hayward *v.* Angell, 1 Vern. 222.

[5] Williams *v.* Angell, 7 R. I. 152.

where the condition is for the performance of a collateral act, the rule is different, as the court have no standard by which to measure the damages.[1] Among the cases illustrating these propositions is one where the grantor granted his estate upon condition that the grantee should pay and discharge a certain mortgage debt * with interest, which he failed [*456] to do, and the grantor himself paid it, and entered upon the land for condition broken without notice, in order to enforce a forfeiture. He then sued for possession of the estate, and the court ordered a stay of proceedings in order to permit the tenant to pay the amount due with interest, and thereby save his estate from forfeiture, there having been no wilful delay.[2] This principle is further illustrated by the case of Hancock *v.* Carlton, where the defendant conveyed to one Clark an estate by deed, in which a condition was inserted, that the grantee should save the grantor harmless from the payment of certain recited debts, which were secured by mortgages upon the granted premises. Clark, at the same time, gave the defendant a mortgage of the premises to secure the payment of the purchase-money over and above the aforesaid mortgages, and then made a second mortgage to the plaintiff. Both plaintiff and Clark having failed to pay the mortgages and save defendant harmless, he entered upon the premises for a breach of condition at common law, as having been thereby forfeited and become irredeemable. The plaintiff brought a bill in equity to redeem, and the court held that, as the condition was to secure the payment of a certain debt, it might be treated in equity as a penalty, and be relievable accordingly, upon evidence that it was occasioned by accident, mistake, fraud, or surprise, where there had been no laches on the part of the one who was to perform. But inasmuch as, upon a hearing, the court found the party guilty of laches, the prayer of the plaintiff was denied.[3] And it has become a

[1] Laussat, Fonbl. Eq. 286, 287, and note; Livingston *v.* Tompkins, 4 Johns. Ch. 431; Skinner *v.* Dayton, 2 Johns. Ch. 526; Bacon *v.* Huntington, 14 Conn. 92; City Bank *v.* Smith, 3 Gill & J. 265; Story, Eq. Jur. §§ 1321–1324; Hill *v.* Barclay, 18 Ves. 56; Henry *v.* Tupper, 29 Vt. 358, 372.

[2] Sanborn *v.* Woodman, 5 Cush. 36; Stone *v.* Ellis, 9 Cush. 95.

[3] Hancock *v.* Carlton, 6 Gray, 39, 52. See Story, Eq. § 1321–1323.

familiar principle, both at law and in equity, that if the lessor sues to recover premises for a forfeiture by non-payment of rent, the proceedings will be stayed if the lessee will pay the rent in arrear and damages.[1]

22. But if the act be wilfully done, or be one for which the court have no certain rule by which to measure the damages beyond their own arbitrary judgment in the matter, equity will not relieve.[2] And among the acts which, as breaches of condition, courts have refused to relieve against, are aliening or assigning a term[3] or a condition to repair or to lay out a certain sum of money in repairs on the premises,[4] or neglecting to insure the premises,[5] or suffering third parties to use a way across leased premises,[6] and the like. So equity will interpose, by way of injunction, to prevent a breach of a restriction in a deed between other parties, where such breach is to operate injuriously to the estate of the plaintiff, though not a party to such deed, if such restriction was designed to benefit the plaintiff's estate which had been derived from the grantor in whose deed the restriction was contained. As where the owner of several lots conveyed them separately, but, for the benefit of them all, inserted a restriction in one of the deeds as to the mode of using the estate, which the purchaser of that estate was about to violate, and the purchaser of another of these lots applied for an injunction to restrain him.[7]

23. As a general proposition, therefore, courts will not interfere to relieve tenants of estates against the consequences of a breach of a condition affecting them at common law, except where the condition consists in the payment of money, which forms, as will hereafter appear, a most marked distinc-

[1] Atkins *v.* Chilson, 11 Met. 112; 2 Greenl. Cruise, 31; Phillips *v.* Doelittle, 8 Mod. 345; Goodtitle *v.* Holdfast, 2 Strange, 900; Hill *v.* Barclay, 18 Ves. 56.

[2] Descarlett *v.* Dennett, 9 Mod. 22; Wafer *v.* Mocato, Id. 112; Northcote *v.* Duke, 2 Eden, 322, n. In Elliott *v.* Turner, 13 Simons, Ch. 485, it is held that *wilful* in such a case is the same as a *voluntary* act of the party. Courts will not relieve except when the damages are certain. Reynolds *v.* Pitt, 2 Price, 212, n.; Hill *v.* Barclay, 18 Ves. 56; Henry *v.* Tupper, 29 Vt. 375.

[3] Wafer *v.* Mocato, 9 Mod. 112; Hill *v.* Barclay, 18 Ves. 56.

[4] Hill *v.* Barclay, 18 Ves. 56; Bracebridge *v.* Buckley, 2 Price, 200.

[5] Reynolds *v.* Pitt, 2 Price, 212, n.; Rolfe *v.* Harris, Id. 206, n.

[6] Descarlett *v.* Dennett, 9 Mod. 22.

[7] Dorr *v.* Harrahan, 101 Mass. 534; Linsee *v.* Mixter, 101 Mass. 512.

tion between estates technically upon condition and that class of conditional estates known as mortgages.

24. The circumstance of an estate being subject to a *condition does not affect its capacity of being [*457] aliened, devised, or descending, in the same manner as an indefeasible one, the purchaser or whoever takes the estate by devise or descent taking it subject to whatever condition is annexed to it.[1]

25. Nor does the existence of such condition change the freehold or chattel character of the estate to which it is annexed. Thus, though an estate for an uncertain period, which may continue for life, is a freehold, an estate to A B for ninety-nine years, provided he live so long, is still a term for years, though its duration may be measured by the length of a life. And on the other hand, an estate to A B for life, or in fee, will be a freehold, though there is annexed to it a condition which may, if it happen, terminate it in a year or any other definite period of time.[2]

26. From what has been said, it must be plain that the right which a conditional grantor of an estate has to regain the estate upon the breach of the condition is a present vested interest of the nature of a reversion, which he may, at any time, convey to his grantee upon condition, by release, or may devise it, and it is transmissible to his heirs. Nor is it subject to any objection on the ground of its coming within the limit of a perpetuity which the law does not allow, although it may not take effect by the event which is to defeat the estate to which the condition is annexed, within the period of time, beyond which an estate may not be originally limited to take effect.[3]

27. In this and many other respects, an estate upon condition, properly speaking, differs from what is known as a conditional limitation. In either case, the estate is a conditional one. But in the one, though the event happen upon which

[1] Taylor *v.* Sutton, 15 Ga. 103; Underhill *v.* Saratoga & Washington R. R., 20 Barb. 455; Wilson *v.* Wilson, 38 Me. 18.

[2] 2 Flint, Real Prop. 232; Ludlow *v.* New York & Harlem R. R., 12 Barb. 440; Co. Lit. 42 a.

[3] Proprietors, &c. *v.* Grant, 3 Gray, 142.

the estate may be defeated, it requires some act to be done, such as making an entry, in order to effect this. In the other, the happening of the event is, in itself, the limit be-
[*458] yond which the * estate no longer exists, but is determined by the operation of the law, without requiring any act to be done by any one.[1] In case of a condition at common law, the grantor or his heirs alone can defeat the estate by entry for condition broken. In a conditional limitation, the estate determines, *ipso facto*, upon the happening of the event, and goes over at once to the grantor by reverter, or to the person to whom it is limited upon the happening of such contingency.[2] So if the breach of a condition be relieved against in chancery, or excused by becoming impossible by the act of God, the estate to which it is annexed remains unimpaired, whereas a limitation determines an estate from whatever cause it arises.[3] This distinction may be illustrated by a familiar example. A grant to A B, provided she continues unmarried, is an estate upon condition; and if she marries, nobody can take advantage of it to defeat the estate but the grantor or his heirs. But a grant to A B, so long as she continues unmarried, is a limitation. The moment she marries, the time for which the estate was to be held has expired, and the estate is not technically defeated, but determined.[4] So the grant of an estate *until* a certain event happens is a *limitation*, and good at the common law, and upon it a remainder may be limited, provided the first estate limited were not in terms a fee absolute or determinable.[5] And sometimes, where the estate is, in terms, an estate upon condition, it is construed into a conditional limitation, where it is necessary to carry out the purposes and intent of the grant. Thus a devise to one's own heir, on condition that he pays a sum

[1] 1 Prest. Est. 456; Id. 54; 2 Flint, Real Prop. 230–232; Proprietors, &c. *v.* Grant, 3 Gray, 142; 2 Bl. Com. 155; 11 Am. Jur. 42; 2 Cruise, Dig. 37; Mary Portington's case, 10 Rep. 42; Co. Lit. 214 b; Miller *v.* Levi, 44 N. Y. 489; Henderson *v.* Hunter, 59 Penn. St. 340.

[2] Att'y Gen. *v.* Merrimack Co., 14 Gray, 612.

[3] 11 Am. Jur. 43.

[4] 2 Flint, Real Prop. 230, 231; Mary Portington's case, 10 Rep. 42; 1 Prest. Est. 49.

[5] 1 Prest. Est. 54; Fearne, Rem. 13 and n.

of money, and, for non-payment, a devise over to a third person, is held to be a limitation, because, if construed to be a condition, no one could enter for the breach and avoid the estate but the heir himself.[1] And the same rule applies wherever there is a limitation over to a third party upon the failure of the first taker to perform the condition, as if an estate be granted by A to B, upon condition that B marry C within two years, and on failure, then to D and his heirs. This would be a limitation. And the estate in both the above cases passes to the second party without any act done in order to put an end to the estate of the first taker. Whereas, if it was technically an estate upon condition, it would require an entry to be made by the grantor in order to defeat it, and he might refuse to make it.[2]

* 28. The ordinary technical words by which a lim- [*459]
itation is expressed, as given in the elementary writers, relate to time. Such are *durante*, *dum*, *donec*, *quousque*, *usque*, *tamdiu*, and the like.[3] But it is apprehended that the mere use of any of these terms, ordinarily expressive of a condition or a limitation, would be an unsafe test of the true nature of the estate. The word *proviso* or "provided," itself, may sometimes be taken as a condition, sometimes as a limitation, and sometimes as a covenant.[4] Where A made a lease for the term of four years, with a proviso that if he sold the estate, and gave the lessee sixty days' notice, he might terminate the lease, it was held to be a limitation, and not a condition, and the estate was determined by such sale and notice.[5] "If" may be a word of limitation as well as of condition. A stranger may take advantage of a limitation, but not of a condition.[6] The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that,

[1] Wellock *v.* Hammond, Cro. Eliz. 204.

[2] 2 Flint, Real Prop. 231; 2 Bl. Com. 155; Proprietors, &c. *v.* Grant, 3 Gray, 142; Fifty Associates *v.* Howland, 11 Met. 99; Stearns *v.* Godfrey, 16 Me. 158, 160.

[3] Co. Lit. 235 a; Mary Portington's case, 10 Rep. 42; Henderson *v.* Hunter, 59 Penn. St. 340, 341.

[4] Co. Lit. 203 b. See also Chapin *v.* Harris, 8 Allen, 594; Cromwel's case; 2 Co. 72 a.

[5] Miller *v.* Levi, 44 N. Y. 489.

[6] Owen *v.* Field, 102 Mass. 105.

where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition.[1] Thus a parol letting of premises to another, so long as he keeps a good school, is a conditional limitation, and no notice or entry is necessary to determine it if the tenant fail to keep such a school.[2] The distinction between condition and limitation is that the latter determines the estate of itself; the former, to have that effect, requires some act of election on the part of him or his heirs in whose favor the condition is created.[3]

29. The term conditional limitation is sometimes, and perhaps very generally, used to express the limiting of an estate — and the estate limited — to take effect upon the determination of the first estate, which shall have ceased upon the happening of the condition upon which it was itself limited. Thus it is said, in Watkins on Conveyancing (Coote, Coventry & White's edition), as if to give point to an antithesis, "between a condition and a conditional limitation there is this difference: a condition respects the destruction and determination of an estate; a conditional limitation relates to the commencement of a new one. A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger."[4] But the terms thus far have been chiefly applied to the first estate created, which has been assumed to be determinable *ipso facto* by the happening of the event by which it was measured.[5]

[*460] *30. This is not the place to enlarge upon the nature of conditional limitations, involving the creation of a

[1] 1 Prest. Est. 129. [2] Ashley *v.* Warner, 11 Gray, 43.

[3] Owen *v.* Field, 102 Mass. 105; Shep. Touch. 125.

[4] Watkins, Conv. 204. "A conditional limitation is therefore of a mixed nature, partaking both of a condition and a limitation: of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest without entry or claim." Per Bigelow, J., Proprietors, &c. *v.* Grant, 3 Gray, 147.

[5] See Fifty Associates *v.* Howland, 11 Met. 102, per Wilde, J.; 2 Bl. Com. 155; 2 Flint, Real Prop. 232; Stearns *v.* Godfrey, 16 Me. 158; 1 Spence, Eq. Jur 154; Wheeler *v.* Walker, 2 Conn. 196; 4 Kent, Com. 127.

new estate to take effect upon a contingent event which has cut short a prior one, except so far as it is necessary to explain what is said above of estates in fee upon condition and conditional limitations being affected by the law against perpetuities. It may be remarked that a remainder is an estate which by its terms is to take effect at the expiration of a prior estate, which is created by one and the same instrument. And, after the definitions of estates already given, it is unnecessary to explain why there can be no remainder, properly speaking, after an estate in fee-simple, nor could that estate be a remainder which, instead of coming in and taking effect at the natural expiration of a prior estate, rises up and cuts it short before its regular determination. There was no way, therefore, at common law, by which an estate could be created to take effect in a stranger after a fee-simple, nor upon the defeat of a prior estate by the breach of a condition. It was not a remainder, nor, though the condition were broken, could the grantee of the second estate do what was necessary in order to defeat the first so as to give effect to the second.[1]

31. But under the rules applicable to estates by devise, and those taking their effect by the doctrine of uses, an estate might be created in favor of A B and his heirs, which, upon the happening of some contingency, should determine by its own limitation, and go over to a third person and his heirs. In order, however, to prevent locking up estates and rendering them inalienable for an indefinite period of time, the courts adopted a rule against what are called perpetuities, by which, unless such second estate shall certainly vest within the period of one or more existing lives, and twenty-one years and a fraction afterwards, the limitation of it will be void *ab initio*. Now, to apply these principles to estates upon condition and conditional *limitations, if A grants his [*461] estate to B and his heirs, to become void if the tenant of the land do some designated act, whatever right there is in respect to the estate, beyond what is granted to B, is reserved to A, and vested in him. He may devise it in some of the States, or it will pass to his heirs; and however long it

[1] Proprietors, &c. *v.* Grant, 3 Gray, 142; 1 Prest. Est. 50; Id. 95; 3 Prest. Abst. 284; 4 Kent, Com. 128.

may be before, if at all, the event may happen, for which the estate granted may be defeated, there is always this vested interest in the heirs or devisees of the original grantor ready to be exercised. But if the disposition of A's grant had been to B and his heirs till some contingent event should happen, and then to C and his heirs, or on condition that if some act should be done or omitted by B or his heirs, then to C and his heirs, this would be a conditional limitation, and as such might be good. And upon the happening of the event, or doing or omitting the act, the estate in B or his heirs would end, and that in C or his heirs take effect. But in the mean time the grantor has parted with his estate, and it would be impossible to tell in whom the ultimate right to the estate might vest, or whether it would ever vest at all, and therefore there could be no conveyance or mode of alienation by which an absolute title could pass of the estate limited to C and his heirs. And if this event or act might not happen within the time prescribed by the rule against perpetuities, the limitation dependent upon it would be void.[1] But the subject of conditional limitations is much more extensive than merely as connected with estates upon condition at common law, and will be resumed in its proper place. It is hardly necessary to add, what will appear in a subsequent chapter, that the estates upon condition at common law which have been here treated of are in most respects distinguishable from conditional estates known as mortgages.

[1] Proprietors, &c. *v.* Grant, 3 Gray, 148, 149.

CHAPTER XV.

ESTATES BY EXECUTION.

THE subject of this chapter is intended to correspond to Estates by Statute Merchant, Elegit, &c., in England, which were in the nature of conditional estates, being held until the rents and profits thereof satisfied the debt of the creditor, who had acquired, by form of law, a right to the possession thereof.

The estate which a creditor may acquire in lands of his debtor in satisfaction of his debt, is generally, in this country, subject to redemption for a prescribed period after being levied upon, and the creditor, as against the debtor, when left in possession, is entitled to the crops like a mortgagee against a mortgagor,[1] so that, independent of any supposed resemblance to the English estate by *elegit*, this seems to be the proper connection in which to treat of this class of estates. It may be added, that if an execution has been levied upon land, and the judgment upon which it issued should be reversed, the title thereby gained would be defeated, and the debtor might recover back his land with mesne profits.[2] And if, in the mean time, the levying creditor shall have made a mortgage of the land levied upon, the court will decree that the mortgage should be discharged.[3] The law, as above stated, is applied also in Maine. But if the execution be satisfied by a sale of the debtor's equity, the original debtor upon reversing the judgment may recover a judgment against the creditor for the debt, but he cannot avoid the sale of his equity of redemption.[4] If land be levied on as the property of the debtor, he cannot defeat the right of the creditor or the purchaser to possession by setting up a title to the premises in a third person.[5]

[1] Coolidge *v.* Melvin, 42 N. H. 537.
[2] Delano *v.* Wilde, 11 Gray, 17.
[3] Ib. 18.
[4] Stinson *v.* Ross, 51 Me. 557.
[5] McDonald *v.* Badger, 23 Cal. 399; Jackson *v.* Bush, 10 Johns. 223.

In reviewing the law as it has heretofore existed in England, it should be borne in mind that, by the common law, lands being at first inalienable under the operation of the feudal system, there was no way in which a creditor could avail himself of the title or possession of his debtor's land for the purpose of satisfying his debt.

The necessities of trade and commerce, in which credit and confidence enter so essentially, developed the exigency which existed for maintaining these by some compulsory process, whereby a reluctant or dishonest debtor might be coerced to make good his engagements. This led to the acts of 11 & 13 Edw. I., called Statutes Merchant; that of 27 Edw. III., called Statute Staple; and that of 23 Hen. VIII., providing for recognizances by which a creditor, under certain circumstances, was authorized by means of the sheriff to make extent upon the lands of his debtor, and hold them until the debt should be satisfied out of the rents and income.

[*463] These statutes and recognizances are now wholly disused in * England. And while the rights of creditors over their debtor's lands are greatly extended there, the form by which this is effected is by what is called the writ of *elegit*, which is a writ of execution issuing upon a judgment recovered or acknowledged in a court of law, and in some cases in the court of chancery. It had its origin in the statute of Westminster, 13 Edw. I. c. 2, and took its name from an expression in the writ of execution, or, as it is called, *fieri facias*, whereby, at his election, the creditor might have one-half of his debtor's land delivered to him until his debt should be satisfied.

To give greater force and effect to this and similar provisions, the judgment became a lien upon his debtor's land, which he could enforce at any time, into whosesoever hands the lands might have come.[1]

The law relative to estates by *elegit*, and the extent to which lands of a debtor are bound by a judgment against him, has been essentially modified by the recent statute of 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, whereby, among

[1] Burton, Real Prop. §§ 873–888; 2 Flint, Real Prop. 241–245; 2 Bl. Com. 160, 161; Wms. Real Prop. 68.

other things, the whole of a debtor's lands may be taken, instead of the half as formerly, and a registration of judgments is provided whereby purchasers can ascertain whether any such existing liens are outstanding upon the lands they are about to purchase.[1]

It seems, however, to be unnecessary, in a work like this, to occupy space with a detail of English statutes upon a matter which, from its nature, must be regulated wholly by statute here as well as there. It is only proposed, therefore, to present an outline of the system of applying the lands of debtors in satisfaction of their debts by the forms of law, as it now or lately prevailed in the several States, remarking that it has always been in accordance with the spirit of the American law to place within the power of the creditor the means of reaching both the real and personal estate of his debtor.

If property be sold upon execution issued upon a judgment regularly rendered by a court having jurisdiction of the parties and matter at interest, the same will pass a good and indefeasible title to the same, although the judgment may subsequently be reversed.[2]

The selling personal estate at auction, and appraising of real * estate, rents, and rights to redeem, is said [*464] to have had its origin wholly in the colony of Massachusetts Bay.[3] And the act of 1647 is cited as the original statute upon the subject. There was also an early provincial act, 1692, charging the lands of debtors with the payment of their debts.[4] In selling a debtor's equity of redemption upon execution, the sheriff acts in place of the debtor, and cannot therefore sell it to debtor's wife, any more than the debtor himself could.[5]

Note. — In all the States the legal interest of every judgment debtor in real estate may be seized and levied on execution; as well as in most of them, his equitable title. This remedy, as has been remarked, was unknown at the

[1] Wms. Real Prop. 66–70; 2 Flint. Real Prop. 245–250.

[2] Gordon *v.* Canal Co., 17 Am. Law Reg. 282 ; Gray *v.* Brignordello, 1 Wall. 627; Parker *v.* Anderson, 5 T. B. Munroe, 445, where the sale was made under a decree of a court of chancery.

[3] 5 Dane, Abr. 22.

[4] Col. Laws, 216.

[5] Stetson *v.* O'Sullivan, 8 Allen, 322.

common law, and its existence depends in all cases upon positive statutes. The remedy given by the English law, however, by the writ of *elegit*, is still in use in Virginia and Delaware.

In most of the States a lien is created on the real estate of the [*465] debtor by the *rendition or docketing of a judgment or final decree.

There is a great diversity of practice in the different States in the method of levying execution upon real estate. In some of the States, moreover, the officer is required to divide the property, if susceptible of division, and sell only so much as will be sufficient to satisfy the execution in absence of any election by the debtor.

In several of the States where land is sold on execution, the debtor [*469] is allowed *a certain time after the levy, in which he may redeem the land by payment of the purchase-money and a specified rate of interest.

In a note to the former editions, the substance of many of these statutes was embodied. But since their publication, so much new matter of a less local interest has been accumulating by the decisions of the various courts upon questions relating to the law of Real Property as they have arisen, that, to prevent its swelling the work to an inconvenient size, it has been thought better to omit, in the present edition, this compendium of statutes, and supply its place by other and more important matter.

CHAPTER XVI.

MORTGAGES.

SECT. 1. Nature and Forms of Mortgages.
SECT. 2. Mortgages with Powers of Sale.
SECT. 3. Equitable Mortgages.
SECT. 4. Of the Mortgagee's Interest.
SECT. 5. Of the Mortgagor's Interest.
SECT. 6. Of the Merger of Interests.
SECT. 7. Of Relief of the Real by the Personal Estate.
SECT. 8. Of Contribution to Redeem.
SECT. 9. Of Accounting by the Mortgagee.
SECT. 10. Of Foreclosure.

* SECTION I. [*475]

NATURE AND FORMS OF MORTGAGES.

1. Mortgages defined.
2. Of the possession of the premises.
3, 4. Nature and history of mortgages.
5, 6. Origin and nature of equities of redemption.
6 *a*. What may be mortgaged.
7. What constitutes a mortgage.
8. What constitutes a defeasance at common law.
9. How far an existing debt is necessary.
10. How far absolute deeds can be made mortgages by parol.
11. Of legal and equitable mortgages.
12. When an agreement must be made to create a mortgage.
13. What agreement sufficient in form to do this.
14, 15. Distinction between a mortgage and a right to repurchase.
16–18. When made to secure a loan, it is a mortgage.
19. A mortgage in express terms may not be controlled.
20. Tests whether it is a mortgage, or sale and right to repurchase.
21. To whom defeasance must be made.
22. Against whom parol defeasances, &c., will operate.
23. A deed once a mortgage, always such.
24. Of subsequent agreements between the parties.

25. Of right of sale and pre-emption by mortgage.
26. No agreement as to redemption, other than of law, good.
27. Priority of mortgage to secure purchase-money.
28. Mortgages to secure support, &c.

1. Mortgages are one form of lien upon real estate to secure the performance of some obligation, more commonly the payment of money. Other forms are seen in the right of a vendor to enforce the payment of the purchase-money for lands sold, out of the land itself, in payments charged upon land by a devise of the same by a testator's last will, in covenants running with land, and in judgment liens which exist in some States by force of statute. Besides these, there are liens created by statute in many of the States in favor of mechanics, for the payment of materials found and work done upon buildings. But while the subject of a vendor's lien will be resumed hereafter, it is not proposed to speak of the other classes of liens beyond mortgages in this chapter, except to refer to the cases below as examples of some of those above referred to.[1] And one other preliminary remark may be proper, that, as ordinarily understood, a lien upon land does not imply an *estate* in it, but a mere right to have it, in some form, applied towards satisfying a claim upon it. The peculiarity of mortgages is that, while in some States they combine the character of lien and estate, in others they form a lien only upon the land.[2] A mortgage at common law may be defined to be an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is, therefore, an estate defeasible by the performance of a condition subsequent.[3] The act which is to defeat the estate must, in order to constitute a

[1] Swasey *v.* Little, 7 Pick. 296; Felch *v.* Taylor, 13 Pick. 133; Hiester *v.* Green, 48 Penn. St. 102; Heist *v.* Baker, 49 Penn. St. 9; Strauss' Appeal, 49 Penn. 353; Bouvier's Du Lien, 33–39.

[2] Ryall *v.* Rolle, 1 Atk. 166.

[3] Wms. Real Prop. 349; Erskine *v.* Townsend, 2 Mass. 493; Lund *v.* Lund, 1 N. H. 39; Mitchell *v.* Burnham, 44 Me. 299; N. H. Rev. Stat. c. 131, § 1; Wing *v.* Cooper, 37 Vt. 179.

mortgage, be to be done by the grantor or his assigns. If, therefore, A convey to B, taking back from B a bond conditioned to support A, and, upon failure to do so, to convey the estate back to A, it was held not to be a mortgage, though it was the ground upon which a decree of specific performance might be based.[1] In another case, however, A sold B an estate, and at the time of making the deed it was agreed in writing that A should retain possession till the purchase-money was paid, and should give up possession upon the payment of the balance of the same. It was held to be a mortgage which A might foreclose against B.[2] And in another case, A made a deed to B, and in it was inserted a condition that the deed was to be void if B failed to pay a certain sum of money agreeably to the terms of a bond then given by B to A. And A might enter and convey the premises to any person. It was held, the rights of the vendor and vendee were those of mortgagee and mortgagor, though it would seem to be an estate upon condition at the common law.[3] But a mere bond or agreement to convey land will not constitute a mortgage, unless given in the way of defeasance.[4] It does not, therefore, relate to the quantity of estate, but to its quality or circumstances which qualify the ownership and enjoyment of property. Though conditional in its character, it differs essentially from an estate upon condition at common law which was considered in a former chapter, both in its purposes and in many of its incidents. In respect to estates upon condition, the estate vests in the grantee, subject to be defeated; but until defeated by act of the grantor, the estate with the possession and the ordinary incidents of ownership are in the grantee. Whereas a mortgage only becomes effectually an estate in the grantee, called the mortgagee, by the grantor or mortgagor failing to perform the condition.[5] The line of distinction which the law draws between an estate upon condition at common law and a mortgage may be illustrated by the case of Hancock *v.* Carlton, which has already

[1] Robinson *v.* Robinson, 9 Gray, 447.
[2] Gibson *v.* Eller, 13 Ind. 125.
[3] Knowlton *v.* Walker, 13 Wis. 265, 272.
[4] Dahl *v.* Pross, 6 Minn. 91; Drew *v.* Smith, 7 Minn. 307.
[5] Fay *v.* Cheney, 14 Pick. 399; Brigham *v.* Winchester, 1 Met. 390; Wood *v.* Trask, 7 Wis. 566.

been referred to (*ante*, p. *456). There, the defendant, owning an estate upon which there were sundry outstanding mortgages to secure debts which he owed, conveyed the same to one Clark, and inserted a condition in the deed that the grantee should pay these mortgages as a part of the consideration, and save him harmless from the payment of the debts. Clark, at the same time, gave back to defendant a mortgage of the premises conditioned to pay the balance of the purchase-money, and for which he gave the defendant his notes. Clark having failed to pay the outstanding mortgages and to save defendant harmless from the same, the latter entered upon the estate for a breach of the condition as at common law. A question was made, whether the plaintiff, to whom Clark had made a second mortgage, could redeem the estate from this forfeiture. In the judgment of the court, this turned upon whether the failure to perform the condition was occasioned by accident, mistake, fraud, or surprise, or by the party's own laches, for, at common law, there was no such right of redemption after condition broken, and courts of equity only allowed it where the party who was to perform had not been guilty of laches. Whereas, so far as the mortgage between the same parties was concerned, their rights were fixed, and the terms upon which redemption might be had as a matter of right were prescribed by law.[1]

2. The possession may be in the grantor or grantee, according to the terms of the deed, though ordinarily it is retained by the grantor. If there is no provision inserted in the deed as to possession, the mortgagee may enter and hold the estate until the condition is performed. But if the condition is performed according to its terms, the estate of the mortgagee is *ipso facto* defeated and at an end. Although, by the form of English conveyances, the mortgagee, in such a case, is bound to reconvey to the mortgagor.[2] On the other hand, [*476] if the mortgagor failed *to perform the required condition, his estate was, by the common law, wholly defeated and gone.[3]

[1] Hancock *v.* Carlton, 6 Gray, 39.

[2] Coote, Mortg. 2; Wms. Real Prop. 349; Id. 351, n.; Erskine *v.* Townsend, 2 Mass. 493; Reading of Judge Trowbridge, 8 Mass. 551-554.

[3] Lit. § 332.

3. The nature of this estate is expressed by the etymology of its name, *mort-gage*, the French translation of the Latin *vadium mortuum*, that is, a dormant or dead pledge, in contrast with *vadium vivum*, an active or living one. They were both ordinarily securities for the payment of money. In the one there was no life or active effect in the way of creating the means of its redemption by producing rents, because, ordinarily, the mortgagor continued to hold possession and receive these. In the other, the mortgagee took possession and received the rents toward his debt, whereby the estate pledged worked out, as it were, its own redemption. Besides, in the one case, if the pledge is not redeemed, it is lost or dead as to the mortgagor; whereas, in the other, the pledge always survives to the mortgagor when it shall have accomplished its purposes.[1] There was besides these another class of pledges of land, called Welsh mortgages, where the mortgagee entered and occupied, and took the rents as a substitute for the interest upon the sum loaned, and held until the estate was redeemed by the mortgagor's paying the principal. The mortgagee could neither enforce the repayment of the debt nor the redemption of the estate, nor could he foreclose it.[2] But both the *vivum vadium* as above described, and the Welsh mortgage, have gone into disuse, leaving the security by way of pledge of real estate in the form of a mortgage in common and ordinary use.* [3]

*4. Various attempts have been made to fix the [*477] origin of estates in mortgage as known to the common law. It is said to be doubtful whether they were in use un-

* NOTE. — Many attempts have been made to trace the origin of the term mortgage. Littleton gives it, in § 332; Mr. Coote, and after him, Mr. Williams, following Glanville, ascribe it to a period when, to avoid the charge of usury in lending money for hire, it was customary to enfeoff the lender with lands, of which he took the rents as substitute for interest, whereby the estate became unprofitable or dead to the debtor. Coote, Mortg. 5; Wms. Real Prop. 352.

[1] Coote, Mortg. 4; Co. Lit. 205; 2 Bl. Com. 157; Ayliff, 524, note.

[2] 1 Powell, Mortg. 373, n.; Coote, Mortg. 4.

[3] Coote, Mortg. 4, 5; 4 Kent, Com. 137. In Louisiana, the mortgage of land answers to the antichresis of the Roman law, the effect of which was, in most respects, like that of an active mortgage, or *vivum vadium*. Livingston *v.* Story, 11 Pet. 388; Dig. Lib. 20, tit. 1, § 11.

der the Saxons; and it is quite certain they did not obtain for some time after the Conquest, since they did not prevail under the feudal system.[1] But they had become common in the time of Henry VI. and Edward IV.[2] Mr. Powell is inclined to ascribe their origin to the Jews,[3] while Mr. Butler derives them from estates upon condition at the common law.[4] And at common law, if the payment was not made at the time fixed, the estate, by the breach of the condition, became forfeited, and the mortgagee thereupon held the same as absolute and irredeemable.[5]

5. The idea of extending the time within which the debtor might redeem his estate beyond that fixed by the contract of the parties, seems to have been borrowed from the Roman law of hypothecation, where the property in the thing hypothecated did not pass out of the debtor until a sale made by authority of the Prætor or Præses, and might be redeemed at any time before sale actually made, by the payment of the money for which it was security.[6] The subject of giving a qualified right in one's property to another, to secure him against loss or hazard under the civil law, is fully treated of by writers, besides what is found in the Institutes and Digest. But it will be sufficient for the present to say that a *pignus* or pawn was something which could be delivered by hand from one to another. *Hypotheca* or *hypothéque* was of immovable things which could not thus be delivered. *Antichresis* was where the thing pledged was used by the pledgee, who thus repaid himself for the use of that which he had lent to the pledgor, whether money or other articles of property.[7] And the English court thus draws a line of distinction between them in its bearing upon the doctrine of mortgage: "An *hypotheca* gave only a lien and no property, with a right to be satisfied on failure of the condition. A mortgage is an immediate conveyance with a power to redeem, and gives a

[1] Coote, Mortg. 2; Fonbl. Eq. 253; Story, Eq. Jur. § 1004.

[2] 1 Spence, Eq. Jur. 602.

[3] 1 Powell, Mortg. 1.

[4] Story, Eq. Jur. § 1005.

[5] Spence, Eq. Jur. 601, 602; Story, Eq. Jur. § 1004.

[6] Story, Eq. Jur. § 1005; 1 Spence, Eq. Jur. 600; Coote, Mortg. 40.

[7] Ayliff, B. 4, c. 18, pp. 524, 525; Wood, Civ. Law, 213, Dig. 20, 1, 5, 1; 1 Brown, Civ. Law, 201.

legal property;" which answers, it will be perceived, to what may be called the common law of mortgages, but so far as it implies the passing of a legal property, not to the law as understood and applied in some of the States upon that subject.[1] But it made its way very slowly against the notions of the common law, though a strict forfeiture in case of mortgage was condemned by the Council of Lateran, A. D. 1178, during the reign of Henry II. It is said Parliament, in 1391, refused to admit a redemption after forfeiture, and such estates continued irredeemable during the reign of Edward IV., who died in 1483. There was a struggle, however, on the part of Chancery to extend relief in such * cases, and [*478] to some effect, under a provision in the Magna Charta in favor of sureties.[2] It is said that an equity of redemption is not mentioned in all the writings of Lord Coke. And in Goodall's case, 39 & 40 Elizabeth, the Court of King's Bench held that an estate was lost to a mortgagor, he having failed to perform the condition "truly and effectually."[3] The disposition to favor a debtor in saving his estate from irretrievable loss, if he was willing to indemnify his creditor from loss on account of his debt, which had grown up under the influences then at work upon the public mind, continued to gain strength until the time of James I., when the Court of Chancery decreed a redemption after a forfeiture, the creditor consenting to give up the land. And finally, in the reign of Charles I., it became settled that the payment or tender after the day should have the same effect in saving the estate of the mortgagor from forfeiture as if done before the day of payment. A case of this kind was decided in the 4th Charles I., A. D. 1629.[4]

6. This right to redeem a mortgaged estate after it had, in view of the common law, been forfeited by a failure to perform the condition of the mortgage, gave to mortgages a double aspect and a double nature, the one created by and known to the common law, the other created by and known only to equity, — this right of redeeming, after breach of

[1] Ryall *v.* Rolle, 1 Atk. 166.
[2] 1 Spence, Eq. Jur. 602, 603.
[3] 2 Fonbl. Eq. 256; Wms. Real Prop. 253; Goodall's case, 5 Rep. 96.
[4] 1 Spence, Eq. Jur. 603; How *v.* Vigures, 1 Rep. in Chancery, 32.

the condition, being what is called a Right in Equity of Redemption, or, in shorter terms, an Equity of Redemption. This simple explanation may serve to reconcile many of the seeming discrepancies which occur in speaking of and describing the respective interests and rights of mortgagors and mortgagees. In law, the mortgagee, as holding the freehold, may sue an action of ejectment and recover possession of the land against the mortgagor. He may devise his interest as real estate by will, or it will descend at common law to his heir. In equity the land is a pledge; the mortgagee [*479] holds this only as a security for a * debt, and like the debt it is an interest of a personal nature, and if he dies the debt goes to his executor, who may receive the same, and oblige the heir to release to the mortgagor without being paid a farthing.[1] This, however, is rather by the way of anticipation, to be more fully explained hereafter, and is stated here in order to serve as a clew for the reader, to guide him in his investigations of principles, which often become seemingly entangled and inconsistent, by disregarding the test which is furnished in this double nature of mortgages.

6 *a*. Another preliminary inquiry relates to what may be the subject of mortgage as real estate. The interest of a mortgagee may itself be thus mortgaged, even in those States where the rights of mortgagees cannot be enforced at common law by ejectments. The courts regard such a mortgage as something more than an assignment of a chose in action. And when mortgaged, such interest will be the subject of redemption or foreclosure, as the case may be, and, if sold for purposes of foreclosure, the surplus, if any, after satisfying the lien of the mortgagee upon the mortgage, will be refunded to the mortgagor.[2] And an arrangement between the original mortgagor and such assignee, or mortgagee of the mortgage, to discharge the original mortgage, to the injury of the assignor, the original mortgagee, was held void as to him. And he was held entitled to recover the balance of the original mortgage debt, deducting the amount for which he

[1] Wms. Real Prop. 353, 354.

[2] Graydon *v.* Church, 7 Mich. 36, 59; Henry *v.* Davis, 7 Johns. Ch. 40; Coffin *v.* Loring, 9 Allen, 154; Johnson *v.* Blydenburgh, 31 N. Y. 432.

had mortgaged the mortgage.[1] Nor would a foreclosure of the first mortgage by the assignee of it in mortgage affect the equities existing between the mortgagor of the mortgage and such assignee in respect to the debt between them, nor the equity of redeeming the mortgage thus mortgaged.[2] A man may make a valid mortgage of an estate for life or for years belonging to him, as collateral security, as he could of an estate or part of it which he owned in fee.[3] If a lessee of land for a term of years erect a house upon the premises by permission of the owner in fee, and then mortgage the land and the house, it has the effect of a mortgage of realty, and it may be foreclosed against the mortgagor. If after such foreclosure another person remove the house without right, the mortgagee may maintain trespass *qu. cl. freg.* or an action on the case for the value of the house.[4] The owner or tenant of land may mortgage the crops or fruits yet to be grown upon it, or he may mortgage fixtures yet to be attached to the premises, to take effect when added.[5] If one is in possession of land under a contract of purchase, he may mortgage the same, and his mortgagee may go on and complete the contract and take the title to himself. And the right to redeem from such a mortgage is the subject of foreclosure, whereby the mortgagee acquires the land subject to the vendor's lien for the purchase-money.[6] So land held by right of pre-emption in California is the subject of mortgage, but not the right itself. And a mortgage of any land held under the government is good against the mortgagor.[7] But a mortgage by husband and wife of the wife's interest as heir at law to her father's estate, while he is still alive, to secure the debt of the husband, is void, it being the mortgage of a mere possibility.[8]

[1] Slee *v.* Manhattan Co., 1 Paige, 48, 78; Hoyt *v.* Martense, 16 N. Y. 231; York Man. Co. *v.* Cutts, 18 Me. 190, 201; Solomon *v.* Wilson, 1 Whart. 241.

[2] Brown *v.* Tyler, 8 Gray, 135, 138.

[3] Lanfair *v.* Lanfair, 18 Pick. 304.

[4] Hogan *v.* Brainard, 44 Vt. 294.

[5] Phila. W. & B. R. R. *v.* Woelpper, 64 Penn. St. 371.

[6] Sinclair *v.* Armitage, 1 Beasley (N. J.), 174, where the agreement of purchase was by parol. Att'y Gen. *v.* Purmort, 5 Paige, 620, 626; Bull *v.* Sykes, 7 Wis. 449, where the contract of purchase was in writing. Holbrook *v.* Betton, 5 Florida, 99.

[7] Whitney *v.* Buckman, 13 Cal. 536. See Wright *v.* Shumway, 2 Am. Law Reg. 20.

[8] Bayler *v.* Commonwealth, 40 Penn. St. 37.

7. The first inquiry naturally is, what constitutes a mortgage? And the answer, in general terms, may be said to be any conveyance of lands intended by the parties, at the time of making it, to be a security for the payment of money or the doing of some prescribed act. Whenever there is, in fact, an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage whatever may be the form adopted, or whatever may be the understanding of the parties.[1] There may be an equitable lien created in favor of one, upon the real estate of another, by express agreement, for the purpose of creating a charge upon the same, for securing the payment of money, although not in form a legal mortgage, and which can only be enforced in equity. Such an agreement raises a trust which binds the estate to which it relates, and all who take title thereto, with notice of such trust, can be compelled in equity to fulfil it.[2] There may be by rules of law in some of the States a difficulty in carrying out the intentions of the parties, by a defect in the evidence required by law to establish this fact. For whether a given transaction is a mortgage or not, and whether it is or is not valid, is a matter of *lex rei sitæ*, although the parties live elsewhere, and it is to be construed by the same law.[3] But without stopping to inquire what the requisite proof of such intention must be, wherever it is legally proved that a conveyance was made for the purposes of security, equity regards and treats it as a mortgage, and of course attaches to it the incidents of a mortgage.[4] * And a mort-

* NOTE. — The object in citing so many cases has been to show how uniform the rule upon the subject is throughout the United States as well as in England. The English treatises speak of mortgages as securities for moneys loaned, and Williams distinguishes that kind of estate by the term "a mortgage debt," "for want," as he says, "of one which can more precisely express the kind of interest intended to be spoken of" (p. 349). But in the present work they are treated of as pledges of real estate for the performance of any act intended to be secured, whether it be the payment of money or not.

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1 Harper's Appeal, 64 Penn. St. 320.

2 In the matter of Howe, 1 Paige, 129; Pinch *v.* Anthony, 8 Allen, 539; Delaire *v.* Keenan, 3 Desauss. 74; Clarke *v.* Sibley, 13 Met. 210; Daggett *v.* Rankin, 31 Cal. 326.

3 Goddard *v.* Sawyer, 9 Allen, 78; Sedgwick *v.* Lafflin, 10 Allen, 433; Cutter *v.* Davenport, 1 Pick. 81.

4 Co. Lit. 205 a, Butler's note, 96; Laussat's Fonbl. Eq. 495 and note;

gage is effectual to pass an estate by way of estoppel in the same manner as an ordinary deed of grant.[1] But if the terms of the condition are void for uncertainty, the deed becomes absolute.[2] It is not however necessary, in order to create a mortgage, that the condition should expressly provide that if it is performed the deed shall be void. The court regards the substance rather than the form of expression, and gives effect to the transaction accordingly.[3] Another *principle seems to be equally well established, [*480] that equity would regard as a nullity any agreement between the parties that an estate so conveyed should not be redeemable, or should be redeemable only at a particular time, or by a particular person or class of persons.[4]

Hughes *v.* Edwards, 9 Wheat. 489; Morris *v.* Nixon, 1 How. 118; Russell *v.* Southard, 12 How. 139; Mende *v.* Delaire, 2 Desauss. 564; Reed *v.* Lansdale, Hardin, 6; James *v.* Morey, 2 Cow. 246; Hodges *v.* Tenn. Marine & Fire Ins. Co., 4 Seld. 416; Briggs *v.* Fish, 2 Chipm. 100; Bigelow *v.* Topliff, 25 Vt. 273; Bank of Westminster *v.* Whyte, 1 Md. Ch. Dec. 536; s. c. 3 Md. Ch. Dec. 508; Wilcox *v.* Morris, 1 Murph. 116; Yarborough *v.* Newell, 10 Yerg. 376; Edrington *v.* Harper, 3 J. J. Marsh. 353; Delahay *v.* McConnel, 4 Scam. 156; Davis *v.* Stonestreet, 4 Ind. 101; Steel *v.* Steel, 4 Allen, 419; Vanderhaize *v.* Hugues, 13 N. J. 244; Gilson *v.* Gilson, 2 Allen, 115; Flagg *v.* Mann, 2 Sumn. 486, 533; Gibson *v.* Eller, 13 Ind. 124; Miami Ex. Co. *v.* United States Bank, Wright (Ohio), 249; Chowning *v.* Cox, 1 Rand. 306; Parks *v.* Hall, 2 Pick. 211, per Wilde, J.; Conway *v.* Alexander, 7 Cranch, 218; Clark *v.* Henry, 2 Cow. 324; Henry *v.* Davis, 7 Johns. Ch. 40; Skinner *v.* Miller, 5 Litt. 86; Wilson *v.* Drumrite, 21 Mo. 325; Cotterell *v.* Long, 20 Ohio, 464; Howe *v.* Russell, 36 Me. 115; Woodworth *v.* Guzman, 1 Cal. 203; Rogan *v.* Walker, 1 Wis. 527; English *v.* Lane, 1 Port. (Ala.) 328; M'Brayer *v.* Roberts, 2 Dev. Eq. 75; Hauser *v.* Lash, 2 Dev. & Bat. Eq. 212; McLanahan *v.* McLanahan, 6 Humph. 99; Somersworth Savings Bank *v.* Roberts, 38 N. H. 22; Stat. N. H. 1853, c. 137, § 1; Stat. of Florida, Thompson, Dig. 1847; Nugent *v.* Riley, 1 Met. 117; Stoever *v.* Stoever, 9 S. & R. 434.

[1] Galveston R. R. *v.* Cowdrey, 11 Wall. 481; Willink *v.* Morris Canal, 3 Green, Ch. 402.

[2] Boody *v.* Davis, 20 N. H. 140; Somersworth Savings Bank *v.* Roberts, 38 N. H. 22.

[3] Steel *v.* Steel, 4 Allen, 417; Lanfair *v.* Lanfair, 18 Pick. 304; Murray *v.* Walker, 31 N. Y. 399.

[4] Co. Lit. 205, Butler's note, 96; Wms. Real Prop. 353; Erskine *v.* Townsend, 2 Mass. 493; Lund *v.* Lund, 1 N. H. 39; Jaques *v.* Weeks, 7 Watts, 268–275; Newcomb *v.* Bonham, 1 Vern. 7; Henry *v.* Davis, 7 Johns. Ch. 40; Clark *v.* Henry, 2 Cow. 327–332; Miami Ex. Co. *v.* U. S. Bank, Wright (Ohio), 249; Eaton *v.* Green, 22 Pick. 526; Flagg *v.* Mann, 14 Pick. 467; Story, Eq. Jur. § 1019; Gillis *v.* Martin, 2 Dev. Eq. 470; Murphy *v.* Calley, 1 Allen, 107; Shoenberger *v.* Watts, 10 Am. Law Reg. 554.

8. In respect to the form of a mortgage, it is usual to insert the terms upon which the conveyance may be defeated in the deed by which it is made. But this is not necessary. It is sufficient if it be done in a separate instrument of defeasance, made as a part of the transaction; though courts disapprove of the latter mode, on account of its liability to lead to accident or abuse. The condition in common mortgage-deeds is usually, substantially, a proviso, "Nevertheless that if A, his heirs, executors, or administrators, shall pay to B, his executors, administrators, or assigns, the sum of ——, with interest, by such a time, then this deed, as also a certain promissory note of even date, signed by the said A, whereby he promises to pay said B the said sum and interest at the time aforesaid, shall both be void." But a deed containing the usual proviso, except the last clause, "then this deed, &c., shall be void," which was omitted, was held not to constitute such a defeasance as to make it a mortgage, until the same had been reformed by the court by inserting a clause to that effect.[1] But where the defeasance is by a separate instrument, it is not necessary that it should bear the same date as the deed itself, provided it be delivered at the same time. Nor would an immaterial discrepancy in the description of the estate between the deed and the instrument of defeasance invalidate its effect as a mortgage.[2] And in order to create a mortgage at common law, or what is called a legal as distinguished from an equitable mortgage, it is necessary that the instrument of defeasance should be of as high a nature as the deed itself which is to be defeated.[3] And an assignment under seal of such instrument of defeasance, together with all right of the assignor to the land therein described, would be a good conveyance of the equity of redemption.[4] Thus a contem-

[1] Adams *v.* Stevens, 49 Me. 362. [2] Brown *v.* Holyoke, 53 Me. 9.

[3] Lund *v.* Lund, 1 N. H. 39; Bodwell *v.* Webster, 13 Pick. 411; Flint *v.* Sheldon, 13 Mass. 443; Harrison *v.* Trustees, 12 Mass. 459; Kelly *v.* Thompson, 7 Watts, 401; Eaton *v.* Green, 22 Pick. 526; Flagg *v.* Mann, 14 Pick. 467; Scott *v.* McFarland, 13 Mass. 309; Dey *v.* Dunham, 2 Johns. Ch. 191; Jaques *v.* Weeks, 7 Watts, 251; Baker *v.* Wind, 1 Ves. Sr. 160; French *v.* Sturdivant, 8 Greenl. 246; Richardson *v.* Woodbury, 43 Me. 206; Warren *v.* Lovis, 53 Me. 463; Hill *v.* Edwards, 11 Minn. 28.

[4] Graves *v.* Graves, 6 Gray, 391.

poraneous bond conditioned to reconvey, made by grantee to grantor, is a sufficient defeasance.[1] And the doctrine may be taken as a general one, that if several instruments are made and delivered the same day between the same parties in relation to the same subject-matter, they are regarded as parts of one instrument, and are to be construed together.[2] In Georgia, it was held that two mortgages of the same estate, made the same day to different persons, create a tenancy in common, though one is delivered two hours prior to the other.[3] *And where the grantee and grantor [*481] entered into an indenture, whereby the grantor bound himself in a penalty to refund the consideration, and the grantee bound himself in a penalty to re-deed the premises upon being repaid in five years, it was held to be something more than a bond to reconvey, being in effect a defeasance of the grantor's deed simultaneously made, converting the same into a mortgage.[4] So where A made a deed, absolute in its terms, to B, and B, at the same time by his agreement, under seal, promised to reconvey the land whenever, within five years, the grantor should repay him the sum of one hundred dollars, and, if not paid within that time, the agreement to be void, and the deed be absolute without any right of redemption, it was held to be a mortgage.[5] In Maine, it is requisite that the instrument of defeasance should be recorded, in order to be valid to change a deed into a mortgage as against any person except the maker of the defeasance, his heirs and devisees.[6] In Barroilhet *v.* Battelle, the mortgage was contained in a lease between the parties, the lessee therein mortgaging a house erected by him on the premises, to secure the rent.[7] But it is impossible to create a lien by the way of

[1] Erskine *v.* Townsend, 2 Mass. 493; Taylor *v.* Weld, 5 Mass. 109; Waters *v.* Randall, 6 Met. 479; Lane *v.* Shears, 1 Wend. 433; Peterson *v.* Clark, 15 Johns. 205; Van Wagner *v.* Van Wagner, 3 Halst. Ch. 27; Marshall *v.* Stewart, 17 Ohio, 356; Cross *v.* Hepner, 7 Ind. 359; Jackson *v.* Green, 4 Johns. 186; Woodward *v.* Pickett, 8 Gray, 617; Baxter *v.* Dear, 24 Tex. 17.

[2] Wing *v.* Cooper, 37 Vt. 178.

[3] Russell *v.* Carr, 38 Ga. 459.

[4] Bayley *v.* Bailey, 5 Gray, 505; Wing *v.* Cooper, *sup.*

[5] Murphy *v.* Calley, 1 Allen, 107; Sharkey *v.* Sharkey, 47 Mo. 543; Robinson *v.* Willoughby, 65 N. C. 520.

[6] Tomlinson *v.* Monmouth Ins. Co., 47 Me. 232.

[7] 7 Cal. 450.

mortgage, by any instrument which is not a deed under seal. An instrument not thus executed would not be a mortgage, though it might be a contract for a mortgage.[1] As will appear hereafter, equity grants relief by decreeing redemption in cases where the defeasance is not by deed, though courts of law with limited jurisdiction have not such a power.[2] But unless the party agreeing to convey derives his title from the party with whom his agreement is made, it does not constitute a mortgage. Thus where A, at the request of B, a mortgagor, purchased an outstanding mortgage under which the holder had entered to foreclose, under an agreement that B might sell the estate, and A would convey it upon being paid what he had advanced to purchase the mortgage, and B suffered the estate to foreclose in A's hands, it was held not to constitute a mortgage between A and B.[3]

9. As the idea of a mortgage is founded upon the conveyance being by the way of security for the payment of money or the like, there must be some evidence of a debt existing from the grantor to the grantee, where the intention is to secure the payment of money, in order to construe such a conveyance as a mortgage. This is ordinarily effected by some writing, such as a bond or a note given by the grantor to the grantee for the repayment of the money loaned at the time of making the deed. But such bond or note is not essential, provided there is a debt between the parties capable of being enforced either against the debtor or the property mortgaged.[4] It is not essential that the recital of the instrument evidencing the debt due in the deed should be, in all respects, like the original; as if, for example, the note was payable to A "or order," and the words "or order" were omitted in the de-

[1] Erwin *v.* Shuey, 8 Ohio St. 510; *post*, p. *519.

[2] Richardson *v.* Woodbury, 43 Me. 266; Eaton *v.* Green, 22 Pick. 526. But now that the courts of Massachusetts have full chancery powers since the Stat. 1857, c. 214, it would seem that the power need no longer be thus limited; Chase *v.* Peck, 21 N. Y. 581.

[3] Capen *v.* Richardson, 7 Gray, 364. See Robinson *v.* Robinson, 9 Gray, 447.

[4] Russell *v.* Southard, 12 How. 139; Jaques *v.* Weeks, 7 Watts, 268-276; Smith *v.* People's Bank, 24 Me. 185; Wharf *v.* Howell, 5 Bing. 499; Brown *v.* Dewey, 1 Sandf. Ch. 56; Rice *v.* Rice, 4 Pick. 349; Mitchell *v.* Burnham, 44 Me. 246, condition was to support certain persons; Hickox *v.* Lowe, 10 Cal. 197; Whitney *v.* Buckman, 13 Cal. 536, 539; Brookings *v.* White, 49 Me. 483

scription.[1] So where the condition of a mortgage was to pay a note for $800, it was held competent for the mortgagor to show it was intended to secure the mortgagee for having become surety in another note for the mortgagor, which the latter had paid.[2] And where the deed described two notes of $150 each, and one of the notes produced in evidence was for $200, it was held competent for the mortgagee to show that it was the note intended to be secured.[3] Nor is it necessary that the debt intended to be secured might be collected in an ordinary suit at law. As where a wife who could make a deed of her lands, but could not bind herself by a promissory note, made a mortgage to secure a note given by her, it was held that the mortgage was good, though the note was not collectible.[4] So a mortgage by husband and wife of wife's land for husband's debt would be good.[5] And this may be done to secure a future as well as a present indebtedness of the husband.[6] So a mortgage to secure an existing indebtedness is held to be for a valuable consideration, and protected accordingly.[7] And although both debt and mortgage may be invalid in the mortgagee's hands for the illegality of the consideration, — the sale of spirituous liquors, for example, — if the mortgage is assigned to one who is ignorant of this, and is done *bona fide*, it will be good in the assignee's hands.[8] Thus where the condition of the deed recited that the grantor was indebted to the grantee for moneys loaned, and his liability on divers bills of exchange and promissory notes, and it provided that if he discharged them within six months the deed should be void, it was held to be a sufficient description of the debt, since it was capable of being made certain by

[1] Hough *v.* Bailey, 32 Conn. 289.

[2] Kimball *v.* Myers, 21 Mich. 276. [3] Cushman *v.* Luther, 53 N. H. 562.

[4] Brookings *v.* White, 49 Me. 479; Beals *v.* Cobb, 51 Me. 348; Van Cott *v.* Heath, 9 Wis. 516, 525; Story, Eq. § 1399; Wyman *v.* Brown, 50 Me. 150; Neimcewicz *v.* Gahn, 3 Paige, 643, 650.

[5] Ellis *v.* Kinyon, 25 Ind. 136; Hubble *v.* Wright, 23 Ind. 322.

[6] Hoffey *v.* Carey, 73 Penn. St. 433.

[7] Babcock *v.* Jordan, 24 Ind. 14; Sharp *v.* Proctor, 5 Bush, 396; Smith *v.* Wilson, 2 Met. (Ky.) 235; Johnston *v.* Ferguson, 2 Met. (Ky.) 503; Hobson *v.* Hobson, 8 Bush, 666; Wolf *v.* Van Metre, 23 Iowa, 397.

[8] Brigham *v.* Potter, 14 Gray, 522; Taylor *v.* Page, 6 Allen, 86.

parol evidence.[1] The law on this point is thus stated by Story, J.: "The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important to ascertain whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*."[2] Therefore, though the holder of the security were to discharge the mortgage, the debtor's liability for the debt would remain; and, on the other hand, if the debt is barred by the statute of limitations, or is discharged by the insolvency of the debtor, the mortgage would still be good.[3] And the doctrine to be derived from the cases cited below seems to be this, that the want of mutuality, that is, [*482] the liability of the grantor to pay, as * well as of the grantee to release upon being paid, is only to be regarded in determining whether the transaction was originally a mortgage or not. If it was intended as a mortgage, this want of mutuality would not prevent its having that character,[4] though a few cases maintain that such mutuality is essential to constitute the transaction a mortgage.[5] And by a recurrence to the English cases, it will appear that the courts there, as is generally done in this country, hold, that, while the absence of this mutuality is an important circumstance bearing upon the question of the transaction being a mortgage, the giving of such bond or mortgage is not essential to

[1] Hurd *v.* Robinson, 11 Ohio St. 242. See Utley *v.* Smith, 24 Conn. 290, 314; Gill *v.* Pinney, 12 Ohio St. 38.

[2] Flagg *v.* Mann, 2 Sumn. 534; Murphy *v.* Calley, 1 Allen, 108; Rich *v.* Doane, 35 Vt. 129; Haines *v.* Thompson, 70 Penn. St. 442.

[3] Ball *v.* Wyeth, 8 Allen, 278.

[4] Flint *v.* Sheldon, 13 Mass. 443; Bodwell *v.* Webster, 13 Pick. 411; Brant *v.* Robertson, 16 Mo. 129; Swetland *v.* Swetland, 3 Mich. 482; Bank of Mt. Pleasant *v.* Sprigg, 1 McLean, 178; Miami Ex. Co. *v.* United States Bank, Wright, Ohio, 252; Dougherty *v.* McColgan, 6 Gill & J. 275; Conway *v.* Alexander, 7 Cranch, 218; Glover *v.* Payn, 19 Wend. 518; Holmes *v.* Grant, 8 Paige, Ch. 243; Stephens *v.* Sherrod, 6 Texas, 294; Bacon *v.* Brown, 17 Conn. 29; Mills *v.* Darling, 43 Me. 565; Hickox *v.* Lowe, 10 Cal. 197; Murphy *v.* Calley, 1 Allen, 108; Flagg *v.* Mann, 14 Pick. 478.

[5] Chase's case, 1 Bland, Ch. 206; Redding *v.* Weston, 7 Conn. 117; Low *v.* Henry, 9 Cal. 538, required the intention of the parties to make it a mortgage to appear in express terms of the deed, if this mutuality did not exist in the way of a note or bond.

constitute it such.[1] Where there is no such bond or note given by the grantor, nor any covenant to repay, in the deed, but a proviso is inserted that if the grantor pays, &c., by a certain day, the deed is to be void, a question has been made whether the grantee has thereby any other remedy against the grantor to recover the money loaned than by enforcing the mortgage upon the land. And it seems now to be settled that he has no personal claim for the money upon the mortgagor.[2] But if the instrument constituting the
* mortgage acknowledges the existence of a debt to [*483]
the mortgagee, for the payment of which the conveyance is made as security, the mortgagee may sue for the same in assumpsit without resorting to the mortgage.[3] It was held in New York, that if a parent makes a mortgage to a child conditioned to pay him a certain sum out of his estate, it would be valid and effectual, and may be enforced by foreclosure, if it can be done without interfering with the rights of creditors.[4]

10. There was a struggle for many years in the minds of the courts in this country, whether and how far it was competent for a party to show by parol evidence, in apparent conflict with the statute of frauds, that a deed, in terms absolute, was, in fact, a mortgage, and was to be so regarded in treating of the rights of the parties thereto to the property thereby conveyed, and of those claiming under them. In the former editions of this work, it was attempted to trace the

[1] Floyer *v.* Lavington, 1 P. Wms. 268; Lawley *v.* Hooper, 3 Atk. 280; Coote, Mortg. 12; King *v.* King, 3 P. Wms. 358; Mellor *v.* Lees, 2 Atk. 494; Exton *v.* Greaves, 1 Vern. 138; Goodman *v.* Grierson, 2 Ball & B. 274.

[2] Briscoe *v.* King, Cro. Jac. 281; Tooms *v.* Chandler, 3 Keble, 454; Suffield, *v.* Baskervil, 2 Mod. 36; Howell *v.* Price, 2 Vern. 701; Floyer *v.* Lavington, 1 P. Wms. 268; Salisbury *v.* Philips, 10 Johns. 57; Drummond *v.* Richards, 2 Munf. 337; Hunt *v.* Lewin, 4 Stew. & P. 138; Elder *v.* Rouse, 15 Wend. 218; Conway *v.* Alexander, 7 Cranch, 218; 1 Powell, Mortg. 61, n.; 1 Powell, Mortg. 774; Scott *v.* Fields, 7 Watts, 360; Tripp *v.* Vincent, 3 Barb. Ch. 613; Ferris *v.* Crawford, 2 Denio, 595; Platt, Cov. 37; Hill *v.* Eliot, 12 Mass. 26. And in New York and Indiana there are statutes conforming to the rule above stated. 2 N. Y. Rev. Stat. 1852, p. 148; 2 Ind. Rev. Stat. 1852, p. 176; Van Brunt *v.* Mismer, 8 Minn. 232.

[3] Yates *v.* Aston, 4 Q. B. 182; Elder *v.* Rouse, 15 Wend. 218. See Goodwin *v.* Gilbert, 9 Mass. 510.

[4] Bucklin *v.* Bucklin, 1 Abb. N. Y. Rep. 242, where the mortgage was made to a trustee in favor of an infant child.

results to which they had come, as well as the steps by which these had been reached, and the grounds upon which they rested. But the law has become so well settled in a large proportion of the States, that it seems to be no longer necessary to occupy so much space with the discussion, but simply to state what the law, in this respect, is understood to be now. The cases referred to in the former editions will still be retained, that if any one should wish to retrace these steps he might be aided by the citations which will here be found. That it is competent to show by parol evidence that a deed absolute in its terms is, in fact, a security by the way of mortgage, seems to be settled in Alabama,[1] Arkansas,[2] California,[3] Connecticut,[4] Florida,[5] Illinois,[6] Indiana,[7] Iowa,[8] Kansas,[9] Kentucky,[10] Maryland,[11] Massachusetts,[12] Michigan,[13] Min-

[1] Bragg *v.* Massie, 38 Ala. 106; English *v.* Lane, 1 Port. 328; Locke *v.* Palmer, 26 Ala. 312; Bryan *v.* Cowart, 21 Ala. 92; Brantley *v.* West, 27 Ala. 542; West *v.* Hendrix, 28 Ala. 226; Parish *v.* Gates, 29 Ala. 254; Crews *v.* Threadgill, 35 Ala. 334; Wells *v.* Morrow, 38 Ala. 125.

[2] Blakemore *v.* Byrnside, 7 Ark. 505; Johnson *v.* Clark, 5 Ark. 321; Scott *v.* Henry, 13 Ark. 112; Jordan *v.* Fenno, Ib. 593; McCarron *v.* Cassidy, 18 Ark. 34; Porter *v.* Clements, 3 Ark. 384.

[3] Pierce *v.* Robinson, 13 Cal. 116; Johnson *v.* Sherman, 15 Cal. 287, 291; Lodge *v.* Furman, 24 Cal. 390.

[4] Washburn *v.* Merrills, 1 Day, 139; Benton *v.* Jones, 8 Conn. 186; Osgood *v.* Thompson Bank, 30 Conn. 27, leaves the point unsettled.

[5] Chaires *v.* Brady, 10 Flor. Rep. 133.

[6] Preschbaker *v.* Feaman, 32 Ill. 483; Sutphen *v.* Cushman, 35 Ill. 196; Price *v.* Karnes, 59 Ill. 276.

[7] Conwell *v.* Evill, 4 Blackf. 67; Smith *v.* Parks, 22 Ind. 59; Hayworth *v.* Worthington, 5 Black. 361.

[8] Trucks *v.* Lindsey, 18 Iowa, 504; Holliday *v.* Arthur, 25 Iowa, 19; Key *v.* McCleary, 25 Iowa, 191.

[9] Moore *v.* Wade, 8 Kan. 381.

[10] Skinner *v.* Miller, 5 Lit. 86; Lindley *v.* Sharp, 7 Mon. 248; Edrington *v.* Harper, 3 J. J. Marsh. 353; Cook *v.* Collyer, 2 B. Mon. 72; Thomas *v.* McCormack, 9 Dana, 109.

[11] Bank, &c. *v.* Whyte, 1 Md. Ch. Dec. 536; s. c. 3 Md. Ch. Dec. 508; Watkins *v.* Stockett, 6 Har. & J. 435; Farrell *v.* Bean, 10 Md. 217; Artz *v.* Grave, 21 Md. 474.

[12] Stackpole *v.* Arnold, 11 Mass. 27; Flint *v.* Sheldon, 13 Mass. 443; Flagg *v.* Mann, 14 Pick. 467; Hunt *v.* Maynard, 6 Pick. 489; Bodwell *v.* Webster, 13 Pick. 411; Eaton *v.* Green, 22 Pick. 526; Lincoln *v.* Parsons, 1 Allen, 388; Coffin *v.* Loring, 9 Allen, 154. The following cases fully sustain the text: Campbell *v.* Dearborn, 109 Mass. 130; McDonough *v.* Squire, 111 Mass. 219.

[13] Sweetland *v.* Sweetland, 3 Mich. 482; Wadsworth *v.* Loranger, Harring. Ch. 113.

nesota,[1] Mississippi,[2] Missouri,[3] New York,[4] New Jersey,[5] North Carolina,[6] Ohio,[7] Pennsylvania,[8] Rhode Island,[9] South Carolina,[10] Tennessee,[11] Texas,[12] Vermont,[13] Virginia,[14] Wisconsin,[15] Nebraska,[16] Nevada,[17] United States,[18] West Virginia.[19] In the cases supposed, if one with notice purchase of the mortgagee holding a deed absolute in its terms, he holds the estate subject to redemption by the mortgagor or his assigns.[20] But a *bona fide* purchaser from the grantee in such a deed, not knowing it to be a mortgage, would hold the estate by an absolute title.[21] In England, it is held that parol evidence is competent to show that a conveyance was made

[1] McClane *v.* White, 5 Minn. 178, 189; Holton *v.* Meighan, 15 Minn. 69.

[2] Vasser *v.* Vasser, 23 Miss. 378; Anding *v.* Davis, 38 Miss. 594; Weathersly *v.* Weathersly, 40 Miss. 469; Watson *v.* Dickens, 12 S. & M. 608.

[3] Hogel *v.* Lindell, 10 Mo. 483; Tibeau *v.* Tibeau, 22 Mo. 77; Slowey *v.* McMurray, 27 Mo. 116.

[4] McIntyre *v.* Humphreys, 1 Hoff. Ch. 31; Despard *v.* Walbridge, 15 N. Y. 378; Slee *v.* Manhattan Co., 1 Paige, 77; Horn *v.* Kettletas, 46 N. Y. 609; Carr *v.* Carr, 52 N. Y. 258–261; Garnsey *v.* Rogers, 47 N. Y. 238.

[5] Crane *v.* Bonnell, 1 Green, Ch. 264; Youle *v.* Richards, Saxton, Ch. 534; Lockerson *v.* Stillwell, 13 N. J. 358; Hogan *v.* Jaques, 4 C. E. Green, 123.

[6] McDonald *v.* McLeod, 1 Ired. Eq. 221; Glisson *v.* Hill, 2 Jones, Eq. 256; Sellers *v.* Stalcup, 7 Ired. Eq. 13; Elliot *v.* Maxwell, 7 Ired. Eq. 246; Blackwell *v.* Overby, 6 Ired. Eq. 38; Steel *v.* Black, 3 Jones, Eq. 427; Gregory *v.* Perkins, 4 Dev. 50.

[7] Miami Ex. Co. *v.* United States Bank, Wright, 252.

[8] Hiester *v.* Maderia, 3 W. & S. 385; Reitenbaugh *v.* Ludwick, 31 Penn. St. 131; Todd *v.* Campbell, 32 Penn. St. 250; Maffitt *v.* Rynd, 69 Penn. St. 387.

[9] Nichols *v.* Reynolds, 1 R. I. 30. [10] Arnold *v.* Mattison, 3 Rich. Eq. 153.

[11] Brown *v.* Wright, 4 Yerg. 57; Overton *v.* Bigelow, 3 Yerg. 513; Lane *v.* Dickenson, 10 Yerg. 373; Hinson *v.* Partee, 11 Humph. 587; Ruggles *v.* Williams, 1 Head, 141; Nichols *v.* Cabe, 3 Head, 93.

[12] Stampers *v.* Johnson, 3 Tex. 1; Carter *v.* Carter, 5 Tex. 93; Hannay *v.* Thompson, 14 Tex. 142.

[13] Baxter *v.* Willey, 9 Vt. 276; Wright *v.* Bates, 13 Vt. 341; Hyndman *v.* Hyndman, 19 Vt. 9; Wing *v.* Cooper, 37 Vt. 178; Hills *v.* Loomis, 42 Vt. 562.

[14] Ross *v.* Norwell, 1 Wash. 14; Thompson *v.* Davenport, 1 Wash. 125; Robertson *v.* Campbell, 2 Call, 421; King *v.* Newman, 2 Munf. 40.

[15] Rogan *v.* Walker, 1 Wis. 527; Fairchild *v.* Rassdall, 9 Wis. 379, 391.

[16] Wilson *v.* Richards, 1 Neb. 342. [17] Saunders *v.* Stewart, 7 Nev. 200.

[18] Russell *v.* Southard, 12 How. 139, 148; Babcock *v.* Wyman, 19 How. 289; Sprigg *v.* Bank of Mt. Pleasant, 14 Pet. 201.

[19] Klinck *v.* Price, 4 W. Va. 4.

[20] Reigard *v.* Neil, 38 Ill. 406; Holliday *v.* Arthur, 25 Iowa, 19; Key *v.* McCleary, 25 Iowa, 193.

[21] Conner *v.* Chase, 15 Vt. 775.

by the way of security only.[1] And such seems to be the rule in general in courts of equity, where deeds are absolute upon their face.[2] But in Georgia and New Hampshire such evidence is precluded by statute.[3] In Maine, though parol evidence is not competent to convert an absolute deed into a mortgage, it was admitted to show a resulting trust in favor of a debtor, who conveyed an estate by an absolute deed for the security of a debt, by which he might redeem it by paying the debt in a reasonable time.[4] The question does not seem to have been raised in Delaware. In Michigan, a distinction is made between a holding of land under an absolute deed given by way of security for a loan and a mortgage. Such a holding is regarded as being that of an agent, and the measure of his liability for rents and the like is that of an agent only.[5] In North Carolina, if a deed intended to be a security, but absolute in its terms, is recorded, it would he postponed to a mortgage in proper form subsequently recorded, since the record of the first would not show the true transaction.[6] It is not competent to show by parol that what purports to be a mortgage-deed is, in fact, an absolute one ;[7] nor, if one absolute in terms has been given as security for one debt, is it competent to show that it is a security for an additional sum to that originally agreed upon.[8]

11. The distinction between equitable and legal mortgages has already been mentioned. Among the instances of such mortgages is that of Delaire *v.* Keenan,[9] where a principal for whom two persons had become sureties made an agreement in writing to sell them his estate for a certain sum, and to take his pay in his own notes, upon which they were sureties, they paying him the balance, he to have a certain time for redemption of the land. It was held to constitute an equitable

[1] Coote, Mortg. 24. [2] Story's Eq. § 1018.

[3] 7 Cobb's Dig. 1851, p. 274; Lund *v.* Lund, 1 N. H. 39; Hebron *v.* Centre Harbor, 11 N. H. 571; Kingsley *v.* Holbrook, 45 N. H. 321.

[4] Bryant *v.* Crosby, 36 Me. 562; Thomaston Bank *v.* Stimpson, 21 Me. 195; Ellis *v.* Higgins, 32 Me. 34; Richardson *v.* Woodbury, 43 Me. 206.

[5] Bernard *v.* Jennison, 27 Mich. 231.

[6] Gregory *v.* Perkins, 4 Dev. Law, 50; Halcomb *v.* Ray, 1 Ired. 342.

[7] Wing *v.* Cooper, 37 Vt. 169. [8] Stoddard *v.* Hart, 23 N. Y. 556

[9] Delaire *v.* Keenan, 3 Desauss. 74.

mortgage. A like principle was applied in Abbott *v.* Godfroy's Heirs.[1] And in Woods *v.* Wallace,[2] the paper held to be an equitable mortgage was not under the seal of the mortgagor. So an equitable mortgage would be made by an instrument of defeasance not under seal, or such as the law would not recognize as a defeasance, or treat as constituting a mortgage.[3] An agreement to mortgage an estate as a security for a debt, though regarded in some cases as an equitable mortgage, can have no validity against third persons who acquire legal interests in or liens upon the property. The same rule applies to mortgages of lands afterwards to be acquired. Equity may in some cases reform an instrument, but it cannot make one.[4] And where the statute requires certain formalities to be observed in order to the making of a valid deed, an instrument, though formal in other respects, if defective in this, will be of no effect in passing an interest by way of mortgage. Thus in States where two witnesses are requisite to mortgage deeds, if executed in presence of one only, the same will be inoperative.[5]

12. Thus far no question has been made as to what would be a sufficient agreement in form to constitute a defeasance or convert an absolute deed into a mortgage, nor the time at which this must be done to be effectual. Numerous questions have arisen upon both branches of this inquiry. As a general proposition, the agreement, whatever it is, must form a part of the original transaction, though it is not essential that it should be reduced to writing at the time. If executed afterwards, in pursuance of such an agreement, it will be regarded as if it formed a part of the original transaction. Thus where a deed was made in July, 1845, and in July, 1846, the gran-

[1] Abbott *v.* Godfroy's Heirs, 1 Mich. 178.

[2] Woods *v.* Wallace, 22 Penn. St. 171.

[3] Story, Eq. Jur. § 1018; Eaton *v.* Green, 22 Pick. 526; Kelleran *v.* Brown, 4 Mass. 444; Gillis *v.* Martin, 2 Dev. Eq. 470. Such mortgages are not cognizable by the courts of Maine or New Hampshire, nor formerly of Massachusetts. But now, by Gen. Stat. c. 113, § 1, it is otherwise.

[4] Coe *v.* Columbus, &c. Railroad Co., 10 Ohio St. 372, 391, 406; Price *v.* Cutts, 29 Ga. 142, 148.

[5] Parret *v.* Shaubhut, 5 Minn. 323; Thompson *v.* Morgan, 6 Minn. 292; Harper *v.* Barsh, 10 Rich. Eq. 149. So in Ohio, Walker, Am. L. 355; *post*, vol. 3, *537; Spader *v.* Lawler, 17 Ohio, 378.

tee gave the grantor a bond, reciting that the deed had been made to secure a loan, and conditioned to reconvey upon payment of a certain sum, it was held to constitute a mortgage.[1] So even though the deed and the defeasance bear different dates, they will constitute a mortgage if delivered together.[2] And where the grantee, at the time of the making of the deed, agreed to execute a defeasance to the grantor, and did so, though at a subsequent time, it was held to retroact so as to create a mortgage, if the grantee in the mean time had done nothing to change the rights of the parties.[3] If there [*490] is any question * as to the time of executing the two papers, or of making the agreement of defeasance, the burden of proof is on the one who sets it up as such.[4] And in showing this he may resort to parol evidence, and he may also show, in the same way, that a defeasance executed at a subsequent time was part of the original agreement.[5] The converse of the proposition above made is equally true, that if the agreement or instrument offered to establish a defeasance be entered into subsequent to the principal deed, and not in pursuance of the original agreement, it will not constitute a mortgage,[6] though in some cases courts have been inclined to hold that a defeasance will relate back to the time of making the original deed.[7] So if a defeasance or an agreement to reconvey on payment of money be written upon the

[1] Montgomery *v.* Chadwick, 7 Iowa, 114, 132. See also Reitenbaugh *v.* Ludwick, 31 Penn. St. 131; Wilson *v.* Shoenberger, 31 Penn. St. 295.

[2] Lund *v.* Lund, 1 N. H. 39; Harrison *v.* Trustees, &c., 12 Mass. 463; Blaney *v.* Bearce, 2 Greenl. 232; Colwell *v.* Woods, 3 Watts, 188; Kelly *v.* Thompson, 7 Watts, 401; Bryan *v.* Cowart, 21 Ala. 92; Swetland *v.* Swetland, 3 Mich. 482; Freeman *v.* Baldwin, 13 Ala. 246; Bennock *v.* Whipple, 12 Me. 340; Lovering *v.* Fogg, 18 Pick. 540; Reitenbaugh *v.* Ludwick, 31 Penn. St. 131; Bodwell *v.* Webster, 13 Pick. 411; Newhall *v.* Burt, 7 Pick. 157; Scott *v.* McFarland, 13 Mass. 309; Marden *v.* Babcock, 2 Met. 99; Hale *v.* Jewell, 7 Greenl. 435. By statute of Maine, they must be executed at the same time, or be part of the same transaction. 1857, p. 563.

[3] Lovering *v.* Fogg, 18 Pick. 540; Coffin *v.* Loring, 9 Allen, 155.

[4] Holmes *v.* Grant, 8 Paige, Ch. 243.

[5] Reitenbaugh *v.* Ludwick, 31 Penn. St. 131.

[6] Lund *v.* Lund, 1 N. H. 39; Swetland *v.* Swetland, 3 Mich. 482; Kelly *v.* Thompson, 7 Watts, 401; Bryan *v.* Cowart, 21 Ala. 9; 2 Crabb, Real Prop. 847.

[7] Scott *v.* Henry, 13 Ark. 112; Crane *v.* Bonnell, 1 Green, Ch. 264. See Reitenbaugh *v.* Ludwick, 31 Penn. St. 131.

back of the deed, though not dated, it will be presumed to be of a simultaneous date, and make it a mortgage.[1]

13. In respect to what will be sufficient in form to constitute a defeasance in equity in South Carolina, Maryland, New Jersey, Michigan, Virginia, Iowa, Connecticut, Ohio, Delaware, and Illinois, it has been held that any agreement in writing is sufficient.[2] But to give a defeasance effect, it must be delivered; and where it was deposited with a third party to be * delivered upon a condition which the [*491] grantor never performed, it was held not to constitute a mortgage.[3] Among the cases bearing upon the question of what will constitute a sufficient agreement to give a deed the character of a mortgage, are the following: An agreement was made under seal that the deed should be deposited with a third person, to be delivered to the grantee if the grantor failed to repay a sum loaned him by a certain time. It was held to be a mortgage.[4] So an agreement that the title should not vest till the purchase-money was paid.[5] So a deed with a condition annexed, that, if the grantor paid certain legacies charged upon other lands, it should be void.[6] So a deed conditioned to become void unless a certain amount is paid by a certain day is, in effect, a deed of mortgage from the debtor to the creditor.[7] A contract to convey, in consideration of a certain sum, with a bond to reconvey upon payment, is a mortgage.[8] An indenture of lease, reciting that the lease is made as security to the lessee for his support by the lessor, was held to be a mortgage.[9] So a lease where the payment

[1] Lessee of Perkins *v.* Dibble, 10 Ohio, 433; Stocking *v.* Fairchild, 5 Pick. 181; Baldwin *v.* Jenkins, 23 Miss. 206; Whitney *v.* French, 25 Vt. 663; Brown *v.* Nickle, 6 Penn. St. 390. But it was held in New Hampshire, that it must first be shown that the defeasance was upon the deed when executed. Emerson *v.* Murray, 4 N. H. 171.

[2] Read *v.* Gaillard, 2 Desauss. 552; Hicks *v.* Hicks, 5 Gill & J. 75; Batty *v.* Snook, 5 Mich. 231; Cross *v.* Hepner, 7 Ind. 359; Breckenridge *v.* Auld, 1 Rob. (Va.) 148; Belton *v.* Avery, 2 Root, 279; Marshall *v.* Stewart, 17 Ohio, 356; 2 Greenl. Cruise, 68, n.

[3] Bickford *v.* Daniels, 2 N. H. 71.

[4] Carey *v.* Rawson, 8 Mass. 159.

[5] Pugh *v.* Holt, 27 Miss. 461; Carr *v.* Holbrook, 1 Mo. 240.

[6] Stewart *v.* Hutchins, 13 Wend. 485.

[7] Austin *v.* Downer, 25 Vt. 558.

[8] Harrison *v.* Lemon, 3 Blackf. 51.

[9] Lanfair *v.* Lanfair, 18 Pick. 299; Gilson *v.* Gilson, 2 Allen, 115.

of the rent for the full term was acknowledged, and the lessee covenanted to reconvey upon being repaid the same, was held to be a mortgage.[1] Where the sale was for the full value, but with an agreement on the part of the grantee, that if he could, within a certain time, sell for more than the purchase-money, with interest, the surplus should be paid over to the grantor, the transaction was held a mortgage.[2] So if the grantee covenant that he will sell within a certain time at the best price, and pay over the residue.[3] Though it was agreed that if the grantor, a debtor, could find a pur-
[*492] chaser within one year, he should be * entitled to the surplus which he would obtain beyond the amount which had been paid him by discharging his debt, and which was a fair value of the land, it was held not to be a mortgage.[4] So where a grantee, at the time of the making of the deed, binds himself to reconvey or pay a certain sum of money to the grantor, at the option of the obligor, it is not a defeasance, and does not constitute a mortgage.[5]

14. It is sometimes difficult to draw the line of distinction between a transaction which constitutes a mortgage, and one where there is a mere right to repurchase on the part of the grantor upon certain terms. The difference in the effect of these is exceedingly important. In the one, equity interposes, and, disregarding the question of time, grants relief after a failure to perform, by giving opportunity to do so at another time. In the other, the law only deals with the contract, and requires the party who would avail himself of the benefit of it to execute his part with precision and punctuality. In the case of a mere right to repurchase upon the payment of a certain sum at a certain time, if there be a failure to comply strictly, all right to the estate is gone, and there is no such thing as redemption in such case.[6] Each case, however, depends upon its own circumstances, and the intention of the parties. But if this is doubtful, courts always incline to

[1] Nugent *v.* Riley, 1 Met. 117.
[2] Gillis *v.* Martin, 2 Dev. Eq. 470.
[3] Ogden *v.* Grant, 6 Dana, 473.
[4] Holmes *v.* Grant, 8 Paige, Ch. 243.
[5] Fuller *v.* Pratt, 1 Fairf. 197; Hebron *v.* Centre Harbor, 11 N. H. 571.
[6] 2 Cruise, Dig. 74, § 38; Robertson *v.* Campbell, 2 Call, 428; Kelly *v.* Thompson, 7 Watts, 401; 4 Kent, 144.

treat it as a mortgage.[1] So a sale with a right to repurchase, though valid, is scrutinized by the courts to see if it has not been resorted to in order to evade the right of redemption in the mortgagor.[2] And a sale to one for a certain consideration, where a clause in the deed provided that, if the grantor should pay such a sum by a certain time, *the obligation* should be void, but he gave no obligation to pay, it was held not to be a mortgage, but a sale with a privilege of repurchase.[3] But a bond, in terms a defeasance, as that the grantee shall reconvey to the grantor, upon being paid a certain sum, does not convert the original conveyance into a mortgage, unless this bond formed a part of the original agreement or transaction between the parties.[4]

15. It is equally competent for the parties to give the transaction of a conveyance of land either of these characters, according to their intention.[5] And the proposition may be regarded as a general one, that a conveyance is not a mortgage, unless the grantee intended to make a loan upon it as security.[6] This doctrine was applied recently under the following facts : One S. agreed with plaintiff to convey to him, or whomsoever he should direct, certain lands at a certain price. Plaintiff then applied to the defendant for a loan of the money, who agreed to make it by advancing and paying to S. the agreed price of the land, and take the title of the same to himself, and, upon payment thereafter of that sum by the plaintiff, he would convey the land to him ; and in the mean time the plaintiff was to have the possession of the land, and pay defendant rent for the same. It was held not to constitute a mortgage, but that the defendant took the land as purchaser, with the relation between him and the plaintiff of vendor and purchaser, under a verbal contract to convey. The burden of proof was on the plaintiff to show that

[1] Hughes *v.* Shraff, 19 Iowa, 342, 343 ; Weathersly *v.* Weathersly, 40 Miss. 469 ; Wing *v.* Cooper, 37 Vt. 179.

[2] Trucks *v.* Lindsey, 18 Iowa, 505.

[3] Pearson *v.* Seay, 35 Ala. 612.

[4] Trull *v.* Skinner, 17 Pick. 216 ; Green *v.* Butler, 26 Cal. 605.

[5] Conway *v.* Alexander, 7 Cranch, 218 ; Page *v.* Foster, 7 N. H. 392 ; Flagg *v.* Mann, 14 Pick. 483 ; Wms. Real Prop. 353, Rawle's note.

[6] De France *v.* De France, 34 Penn. St. 385 ; Rich *v.* Doane, 35 Vt. 125, 129.

the deed was taken for his benefit, and as security for a loan, and there was nothing to show that the plaintiff became a debtor, or bound himself to pay the purchase price.[1] On the other hand, if the transaction of the parties actually constitutes a mortgage in terms, it will have that effect, though not so intended by them when it was done. Thus where one made a deed, and the grantee gave back a bond to reconvey on certain conditions, it was held that, though not intended thereby to create a mortgage, it was one in fact.[2]

16. The question seems to resolve itself into whether there is a loan and a security therefor intended by the parties, or a *bona fide* sale with a right to repurchase. Thus, where L., who had a verbal promise from P., to whom he had conveyed land, to reconvey it on being paid, &c., applied to W. to loan money on the land, who refused, but offered to take an absolute deed of purchase from L. and P., and paid for the land, and at the same time gave L. a bond to reconvey the [*493] estate within a certain * time, upon being repaid the purchase-money, it was held not to constitute a mortgage, but a right to repurchase. There was no loan by W. to L.[3] So where the grantee, immediately after the execution of a deed of sale, gave back, but not as a part of the original contract, a writing, that if the grantor would, within a certain time, bring so much money, — the purchase-money and interest, — he would give up the deed, but, if not then paid, the grantor was to forfeit all claim to the deed, it was held a contract to repurchase, and not a mortgage.[4] A court of equity will not, at the instance of a grantor, declare a deed made to defraud or delay creditors, which is absolute in its terms, to be a mortgage or a trust.[5]

17. There have been numerous cases, both in England and this country, where this question has been raised, and certain things have been held to bear upon its being a *bona fide* sale,

[1] Fullerton *v.* McCurdy, 55 N. Y. 637. But see Houser *v.* Lamont, 55 Penn. St. 311.

[2] Colwell *v.* Woods, 3 Watts, 188; Kunkle *v.* Wolfersberger, 6 Watts, 126.

[3] Flagg *v.* Mann, 14 Pick. 467.

[4] Reading *v.* Weston, 7 Conn. 143; Cook *v.* Gudger, 2 Jones (N. C.) Eq. 182; Lokerson *v.* Stillwell, 13 N. J. 359.

[5] May *v.* May, 33 Ala. 203; Hiller *v.* Marchell, 21 Ill. 152.

with a contract to repurchase, or a mortgage under the form of a sale, to which reference will now be made. The above is a test of whether a transaction is a mortgage or not, as recognized by the English courts.[1] In several cases, it was held that a conveyance in satisfaction of a prior debt, though accompanied by a clause of redemption, was not a mortgage, but a sale, with a right of repurchase,[2] depending upon whether the debt is extinguished, or the relation of debtor and creditor remains, and a debt still subsists.[3] In the others, cited below, a sale at an agreed price paid, with an agreement that the vendor may repurchase at an advanced price, was held to be but an agreement for a repurchase.[4]

*18. It seems, after all, to be a question of evi- [*494] dence for the court to determine upon the facts in each case, whether the transaction is a mortgage or a sale with right of repurchase. Thus, in the cases cited below, the court held that an absolute conveyance with a condition or bond for reconveyance on the payment of a fixed sum, at a day certain, was *prima facie* a mortgage, independent of evidence showing the existence of a debt.[5]

19. And his doctrine was carried so far as to disallow parol evidence, in similar cases, to show that there was no mortgage, on the ground that, though such evidence is admissible to show that an absolute deed was intended as a mortgage, it is not competent by such evidence to show that what purports to be a mortgage was a conditional sale.[6] For other cases illustrative of the distinction between a mortgage and a con-

[1] Williams *v.* Owen, 5 Mylne & C. 303; Barrell *v.* Sabine, 1 Vern. 268; Perry *v.* Meddowcroft, 4 Beav. 197; Cotterell *v.* Purchase, Cas. Temp. Talb. 61; Endsworth *v.* Griffith, 15 Vin. Abr. 468, pl. 8; Lucas *v.* Byrne, 5 Bro. Par. Cas. 184; 2 Eq. Cas. Abr. 595, pl. 6; Haines *v.* Thompson, 70 Penn. St. 442.

[2] Robinson *v.* Cropsey, 2 Edw. Ch. 138, s. c. 6 Paige, Ch. 480; McKinstry *v.* Conly, 12 Ala. 678; Poindexter *v.* McCannon, 1 Dev. Eq. 373; West *v.* Hendrix, 28 Ala. 226; Hickox *v.* Lowe, 10 Cal. 197.

[3] Hoopes *v.* Bailey, 28 Miss. 328; Slowey *v.* McMurray, 27 Mo. 113, 116.

[4] Glover *v.* Payn, 19 Wend. 518; Brown *v.* Dewey, 2 Barb. 28.

[5] Watkins *v.* Gregory, 6 Blackf. 113; Peterson *v.* Clark, 15 Johns. 205; Rice *v.* Rice, 4 Pick. 349.

[6] Kerr *v.* Gilmore, 6 Watts, 405; Brown *v.* Nickle, 6 Penn. St. 390; Woods *v.* Wallace, 22 Penn. St. 171; Wing *v.* Cooper, 37 Vt. 182; Kunkle *v.* Wolfersberger, 6 Watts, 126; Haines *v.* Thompson, 70 Penn. St. 438, 440.

ditional sale, the reader is referred to the authorities cited below.[1]

20. Among the circumstances which courts regard as of great weight in determining whether a sale absolute in its terms is or is not to be treated as a mortgage, is the adequacy or inadequacy of the consideration paid. If grossly inadequate, it is deemed a strong circumstance in favor of regarding the transaction a mortgage, though it is not conclusive.[2] And where the evidence leaves it doubtful whether it is a mortgage or a contract for repurchase, courts incline to treat it as a mortgage.[3]

[*495] * 21. A further requisite of what would be considered a sufficient defeasance in form to convert an absolute deed into a mortgage, is that it should be made to the grantor himself; if to a stranger, or to the grantor and a stranger, it would not have that effect;[4] as where a clause in the deed of grant gave a stranger a right to redeem by paying a certain sum of money, agreeably to a bond given by the grantee to this stranger, it was held not to constitute a mortgage of which the obligee could avail himself;[5] though if the grant be by the husband and wife of the wife's estate, a defeasance made to her alone would constitute it a mortgage.[6] If a deed clearly appears upon its face to be a mortgage,

[1] Hiester *v.* Maderia, 3 Watts & S. 384; Waters *v.* Randall, 6 Met. 479–482; 1 Powell, Mortg. 138 a; Verner *v.* Winstanley, 2 Sch. & L. 393; Luckett *v.* Townshend, 3 Tex. 119; Baker *v.* Thrasher, 4 Denio, 493; Slowey *v.* McMurray, 27 Mo. 113.

[2] Holmes *v.* Grant, 8 Paige, Ch. 243; Conway *v.* Alexander, 7 Cranch, 218; Todd *v.* Hardie, 5 Ala. 698; English *v.* Lane, 1 Port. (Ala.) 328; West *v.* Hendrix, 28 Ala. 226; Moss *v.* Green, 10 Leigh, 251; Vernon *v.* Bethell, 2 Eden, Ch. 110; Oldham *v.* Halley, 2 J. J. Marsh. 113; Edrington *v.* Harper, 3 J. J. Marsh. 353; Bennett *v.* Holt, 2 Yerg. 6; Davis *v.* Stonestreet, 4 Ind. 101; Sellers *v.* Stalcup, 7 Ired. Eq. 13; Kemp *v.* Earp, Id. 167; Elliott *v.* Maxwell, Id. 246; Russell *v.* Southard, 12 How. 139.

[3] Skinner *v.* Miller, 5 Litt. 86; Ward *v.* Deering, 4 Mon. 44; Wilkins *v.* Sears, Id. 343; Desloge *v.* Ranger, 7 Mo. 327; Crane *v.* Bonnell, 1 Green, Ch. 264; Scott *v.* Henry, 13 Ark. 112; Turnipseed *v.* Cunningham, 16 Ala. 501; Cotterell *v.* Long, 20 Ohio, 464; Swetland *v.* Swetland, 3 Mich. 645; Gillis *v.* Martin, 2 Dev. Eq. 470; Eaton *v.* Green, 22 Pick. 526; Coote, Mortg. Am. ed. 57, and note.

[4] Flagg *v.* Mann, 14 Pick. 467; 2 Bl. Com. 327; Low *v.* Henry, 9 Cal. 538.

[5] Warren *v.* Lovis, 53 Me. 463.

[6] Mills *v.* Darling, 43 Me. 565.

parol evidence is not admissible to show that it was a conditional sale only, and not a mortgage.[1]

22. Questions as to the effect of parol agreements, or separate instruments upon deeds absolute in their terms, can only arise between the parties or purchasers with notice. In some States defeasances are required to be recorded, which then raise constructive notice to all persons interested.[2] But without actual or constructive notice of an existing defeasance, a *bona fide* purchaser, or attaching creditor of an estate, is not affected by its having been made.[3] In Michigan and Minnesota, if a deed purports to be absolute, but is defeasible by force of a deed or other instrument of defeasance, the original conveyance shall not be affected thereby, as against any person other than the maker of the defeasance, or his heirs or devisees, unless the instrument of defeasance shall have been recorded in the registry of deeds.[4] Nor will the continued possession by the grantor of *land after the [*496] making of his deed be notice of a defeasance held by him which is not recorded.[5]

23. If the transaction between the parties be in fact a mortgage, its character cannot be affected or changed by any agreement entered into at the time between them as to redemption or the other incidents of a mortgage. The right of redemption attaches as an inseparable incident created by law, and cannot be waived by agreement.[6] A mortgage, moreover, depends for its validity upon the law in force at

[1] Kerr *v.* Gilmore, 6 Watts, 405; Woods *v.* Wallace, 22 Penn. St. 171; Kunkle *v.* Wolfersberger, 6 Watts, 126; Haines *v.* Thompson, 70 Penn. St. 438.

[2] Tomlinson *v.* Monmouth Ins. Co., 47 Me. 232.

[3] Walton *v.* Cronley, 14 Wend. 63; Manufacturers' Bank *v.* Bank of Pennsylvania, 7 Watts & S. 335; Brown *v.* Dean, 3 Wend. 208; James *v.* Johnson, 6 Johns. Ch. 417; Jaques *v.* Weeks, 7 Watts, 261; Friedley *v.* Hamilton, 17 S. & R. 70; Dey *v.* Dunham, 2 Johns. Ch. 182; Harrison *v.* Trustees, &c., 12 Mass. 456; Purrington *v.* Pierce, 38 Me. 447; Jackson *v.* Ford, 40 Me. 381; Wyatt *v.* Stewart, 34 Ala. 716; Henderson *v.* Pilgrim, 22 Tex. 475; Knight *v.* Dyer, 57 Me. 177.

[4] Comp. Laws, 1871, vol. 2, p. 1346; Minn. Stat. at Large, 1873, vol. 1, p. 640.

[5] Kunkle *v.* Wolfersberger, 6 Watts, 126; Newhall *v.* Pierce, 5 Pick. 450; Hennesey *v.* Andrews, 6 Cush. 170; Crassen *v.* Swoveland, 22 Ind. 434.

[6] Wing *v.* Cooper, 37 Vt. 181.

the time of its execution.[1] The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at the time of the execution of the deed, nor upon any contingency whatever. Equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan.[2]

24. This does not preclude any subsequent *bona fide* agreement in respect to the estate between the parties; and where a mortgagor voluntarily cancelled the instrument of defeasance which he held, it gave to the deed which it was intended to defeat the effect of an original absolute conveyance as between the parties.[3] But where a vendee of land mortgaged it back to his vendor, and then gave up and cancelled his deed which had not been recorded, it was held that, so long as the mortgagee retained his mortgage, this did not operate as a reconveyance by the mortgagor to the mortgagee.[4] The mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title. This, however, is always regarded with great jealousy by courts of equity, and will be avoided for fraud actual or constructive, or for any unconscionable advantage taken by the mortgagee

[1] Olson *v.* Nelson, 3 Minn. 58.

[2] Clark *v.* Henry, 2 Cow 324; Miami Ex. Co. *v.* United States Bank, Wright, 253; Eaton *v.* Whiting, 3 Pick. 484; Vernon *v.* Bethell, 2 Eden, Ch. 110; 1 Spence, Eq. Jur. 693; 2 Fonbl. Eq. 263; Henry *v.* Davis, 7 Johns. Ch. 40; 2 Crabb, Real Prop. 847; Waters *v.* Randall, 6 Met. 479; Johnston *v.* Gray, 16 S. & R. 361; Co. Lit. 205 a, n. 96; Coote, Mortg. 14; Willett *v.* Winnell, 1 Vern. 488; Story, Eq. Jur. §§ 10, 19; Bayley *v.* Bailey, 5 Gray, 505; Thompson *v.* Davenport, 1 Wash. (Va.) 125; Davis *v.* Stonestreet, 4 Ind. 101; Rankin *v.* Mortimere, 7 Watts, 372; Lee *v.* Evans, 8 Cal. 424; Nugent *v.* Riley, 1 Met. 117; Newcomb *v.* Bonham, 1 Vern. 7; Howard *v.* Harris, 2 Ch. Cas. 147; Blackburn *v.* Warwick, 2 Younge & C. 92; Langstaffe *v.* Fenwick, 10 Ves. 405; Baxter *v.* Child, 39 Me. 110; Batty *v.* Snook, 5 Mich. 231; Wms. Real Prop. 353; Vanderhaize *v.* Hugues, 13 N. J. 244; Wynkoop *v.* Cowing, 21 Ill. 570; Oldenbaugh *v.* Bradford, 67 Penn. St. 104.

[3] Trull *v.* Skinner, 17 Pick. 213; Harrison *v.* Trustees, 12 Mass. 456; Marshall *v.* Stewart, 17 Ohio, 356; Vennum *v.* Babcock, 13 Iowa, 194; Falis *v.* Conway Ins. Co., 7 Allen, 49; Rice *v.* Bird, 4 Pick. 350, note; Green *v.* Butler, 26 Cal. 602.

[4] Patterson *v.* Yeaton, 47 Me. 308; Nason *v.* Grant, 21 Me. 160; Lawrence *v.* Stratton, 6 Cush. 163.

*in obtaining it.[1] It will be sustained if perfectly [*497] fair and for an adequate consideration.[2]

25. There is often, as will appear hereafter, a power of sale contained in a mortgage, whereby, upon failure to perform by the mortgagor, the mortgagee may sell the premises at public auction. In such cases, if the authority to make the sale is executed and regulated by statute, the mortgagee may himself become the purchaser.[3] But he cannot do so and thereby extinguish the mortgagor's right of redemption against his consent, where the sale is made by agreement between the parties, though made at public auction. It is in the nature of a trust to sell, where the trustee cannot himself be purchaser.[4] It seems that an agreement of pre-emption made simultaneously with the mortgage whereby the mortgagor engaged that, if the estate was sold, the mortgagee should have the pre-emption, may be good and enforced by the court.[5]

26. So careful is equity to guard against every attempt to limit or curtail the rights of mortgagors in respect to the redemption of estates by any contemporaneous agreement, that it will relieve against any such agreement if it limits the redemption to a certain time,[6] or restricts it to a certain class of persons,[7] or gives to the mortgagee, after default of the mortgagor, a right to purchase the estate at a particular sum,[8] or to pay an increased rate of interest in order to redeem, if the debt is not paid at its maturity,[9] or to pay interest upon the interest in *arrear, as well as upon the [*498] principal, by making it a part of the principal,[10] or to

[1] Russell *v.* Southard, 12 How. 139, 154; Platt *v.* McClure, 3 Woodb. & M. 151; Hyndman *v.* Hyndman, 19 Vt. 9; Green *v.* Butler, *sup.*; Ford *v.* Olden, L. R. 3 Eq. Cas. 461.

[2] M'Kinstry *v.* Conly, 12 Ala. 678; Hicks *v.* Hicks, 5 Gill & J. 75; Sheckell *v.* Hopkins, 2 Md. Ch. Dec. 89; Holridge *v.* Gillespie, 2 Johns. Ch. 30; Wynkoop *v.* Cowing, 21 Ill. 570.

[3] Bergen *v.* Bennett, 1 Caines' Cas. 1. [4] Hyndman *v.* Hyndman, 19 Vt. 9.

[5] Orby *v.* Trigg, 2 Eq. Cas. Abr. 599, pl. 24.

[6] Newcomb *v.* Bonham, 1 Vern. 7; Spurgeon *v.* Collier, 1 Eden, Ch. 55.

[7] Howard *v.* Harris, 2 Ch. Cas. 147; Johnston *v.* Gray, 16 S. & R. 361; Jason *v.* Eyres, 2 Ch. Cas. 33.

[8] Willett *v.* Winnell, 1 Vern. 488; Waters *v.* Randall, 6 Met. 479.

[9] Coote, Mortg. 511; Mayo *v.* Judah, 5 Munf. 495; Hallifax *v.* Higgens, 2 Vern. 134.

[10] Blackburn *v.* Warwick, 2 Younge & C. 92. See McGready *v.* McGready, 17 Mo. 597; Chambers *v.* Goldwin, 9 Ves. 271.

pay a sum over and above the principal and interest in order to redeem.[1] It was also laid down in one case that equity would relieve against a condition in a mortgage whereby a debt due by instalments should be payable at once upon failure to pay any instalment as it should fall due.[2] As the debt due was not on interest, the effect of making it all due and payable, upon the failure to pay any instalment, would be loss of the interest upon the debt to the obligee, between the times of payment of the instalment and of the subsequent instalments, by the way of a penalty, against which equity will grant relief. But where a bond was payable with interest on time, with a proviso that, if the interest is not promptly paid, the principal shall be at once due and collectible, it was held it might be enforced.[3] And the better opinion seems to be, that such agreement would be held valid both at law and in equity; and, if by the terms of the mortgage the whole debt is at once due upon a failure to pay the interest or instalment, it needs no action of the holder of the mortgage by way of election to make it payable,[4] whereas if, by its terms, the debt is to be due in such a contingency, at the election of the mortgagee, he is to signify such election by notice to the mortgagor before proceeding to enforce the mortgage for the whole debt.[5] Equity, however, will save the mortgagor from the consequences of such non-payment if he has been ready and offered to pay the same to the mortgagee, although the mortgage had been previously assigned to a third party, if not informed who was then the holder of the mortgage.[6] Where there was a rate of interest fixed upon the loan less than the lawful interest, with a proviso that if not paid by a certain time the interest should be at another rate, it was held to be a valid security for such increased rate.[7] If a

[1] Jennings *v.* Ward, 2 Vern. 520. [2] Tiernan *v.* Hinman, 16 Ill. 400.

[3] Ottawa Plank Road *v.* Murray, 15 Ill. 336. See *post*, *555.

[4] Ferris *v.* Ferris, 28 Barb. 29; Valentine *v.* Van Wagner, 37 Barb. 60; Basse *v.* Gallegger, 7 Wis. 442, 446; Gowlett *v.* Hanforth, 2 Wm. Black. 958; James *v.* Thomas, 5 B. & Ad. 40; The People *v.* Sup. Court, 19 Wend. 104; Noyes *v.* Clark, 7 Paige, 179.

[5] Basse *v.* Gallegger, 7 Wis. 442, 446.

[6] Noyes *v.* Clark, *sup.* See also Mitchell *v.* Burnham, 44 Me. 303; James *v* Johnson, 6 Johns. Ch. 417.

[7] Brown *v.* Barkham, 1 P. Wms. 652.

mortgagee avail himself of his position and the necessities of the mortgagor to gain any collateral advantage out of the estate, such as a lease, equity will relieve against it.[1]

27. Although it may be assumed that, where two creditors obtain simultaneous liens upon a debtor's property, they become tenants in common from the impossibility of discriminating in regard to their respective equities,[2] yet where the same grantor made two mortgages simultaneously, one to his vendor to secure the purchase-money and the other to a third person to secure an independent debt, it was held that the mortgage first mentioned took precedence of the other in its lien upon the premises.[3] Otherwise they would share *pro rata* in proportion to their respective debts.[4] So where a purchaser secures the purchase-money either to the vendor or to one who pays it, by a mortgage simultaneous with his deed, it will take precedence of an outstanding judgment against him.[5]

28. There is a pretty large class of mortgages which are somewhat different from those ordinarily in use, and yet vary so much in their terms as to render it difficult to reduce them within any general and uniform rule; and that is, mortgages conditioned to support the mortgagee or some other person. These are sometimes made with a collateral bond or contract on the part of the mortgagor, which is referred to in the condition of the deed, and sometimes by a recital only in the deed. From the general tenor of the cases, some few rules and principles seem to have been settled which may be regarded as of general application. Thus, in New Hampshire, where the obligation binds the mortgagor, his heirs, executors, and administrators, but says nothing of assigns, it is held to be a personal duty, and it is not competent for the mortgagor to convey his estate, nor can his creditors levy upon it, so as thereby to have the purchaser or creditor acquire a right to perform the condition and save the estate.[6] And if the mort-

[1] Gubbins *v.* Creed, 2 Sch. & L. 213; Holridge *v.* Gillespie, 2 Johns. Ch. 30.

[2] *Ante*, p. *416.

[3] Clark *v.* Brown, 3 Allen, 509.

[4] Aldrich *v.* Martin, 4 R. I. 520. See Gilman *v.* Moody, 43 N. H. 243. Parol evidence competent to show which of two or more deeds simultaneously executed was intended to take precedence.

[5] Curtis *v.* Root, 20 Ill. 57.

[6] Bryant *v.* Erskine, 55 Me. 156.

gagor fails to do this in his lifetime, or his heirs and executors after his death, the mortgagee may enter and take possession of the mortgaged premises for condition broken.[1] Such a contract and mortgage are not the subject of assignment, for the reason that it can only be performed to and with the mortgagee, personally.[2] But if the mortgagee assent to the transfer by the mortgagor, the assignee would have the same right to possession and be subject to the same liabilities as the mortgagor himself.[3] And where the condition was to pay a debt of a certain amount by supporting the mortgagee a certain length of time, the mortgagee may insist upon the support being provided, and it is not at the election of the mortgagor to do this or pay the money.[4] But where the condition was to pay $2,500 or support the mortgagee, it was for the mortgagor to elect; and when he has elected, he is concluded by it.[5] And in order to have a demand for support on the part of the mortgagee effectual, he must be ready and offer to receive it at a reasonably convenient place, if none is fixed in the agreement of the parties.[6] In the second place, this duty of furnishing support to the mortgagee, where the consideration of the obligation is the conveyance by the mortgagee to the mortgagor of the premises mortgaged, ordinarily implies, in the absence of any express provision, and it would be so construed, that the mortgagor should retain possession until condition broken.[7] In the next place, unless there is something in the deed restricting the place at which the support shall be furnished, the mortgagee is not bound to receive it at any particular place, but may require it to be furnished at any reasonable distance from the mortgaged premises, pro-

[1] Flanders *v.* Lamphear, 9 N. H. 201; Eastman *v.* Batchelder, 36 N. H. 141. See Clinton *v.* Fly, 10 Me. 292.

[2] Bethlehem *v.* Annis, 40 N. H. 34.

[3] Bryant *v.* Erskine, 55 Me. 156, 157; Daniels *v.* Eisenlord, 10 Mich. 454; Mitchell *v.* Burnham, 57 Me. 322.

[4] Hawkins *v.* Clermont, 15 Mich. 513; Evans *v.* Norris, 6 Mich. 369.

[5] Bryant *v.* Erskine, *sup.*; Soper *v.* Guernsey, 71 Penn. St. 224.

[6] Holmes *v.* Fisher, 13 N. H. 9.

[7] Flanders *v.* Lamphear, *sup.*; Wales *v.* Mellen, 1 Gray, 512, overruling Colman *v.* Packard, 16 Mass. 39; Rhoades *v.* Parker, 10 N. H. 83; Dearborn *v.* Dearborn, 9 N. H. 117; Bryant *v.* Erskine, *sup.*; Soper *v.* Guernsey, 71 Penn. St. 224.

vided it do not occasion to the mortgagor unreasonable additional expense and trouble to that of furnishing it upon the mortgaged premises. It should be at a reasonable place for both parties.[1] Where the condition was for the support of the grantor by the grantee upon the granted premises, it did not imply that the grantor was to receive this in the family and at the table of the grantee, although he lived in fact upon the premises.[2] If the support to be furnished be to others than the mortgagee, and they survive him, his executors or administrators are the parties to enforce the mortgage for the benefit of such survivors.[3] And if there be a breach of condition by failure to furnish such support, equity will allow the mortgagor or his assigns to redeem by paying in money an equivalent for the support thus withheld.[4]

SECTION II.

MORTGAGES, WITH POWERS OF SALE.

1. Such mortgages now held valid.
2. The mortgagee trustee for mortgagor.
3. Such a power is coupled with an interest.
4. And passes by assignment.
5, 6. How it may be executed.
7. Mortgagee, if a trustee, cannot be purchaser.
8. Power of sale works no other change in a mortgage.
9. No redemption after a sale.
10. Power of sale extinguished by payment of the debt.
11. Of trust deed, with powers of sale.

1. It is now well settled that a mortgage may be made with a power of sale in the mortgagee, in case the debt

[1] Wilder *v.* Whittemore, 15 Mass. 262; Pettee *v.* Case, 2 Allen, 546; Thayer *v.* Richards, 19 Pick. 398; Fiske *v.* Fiske, 20 Pick. 499; Flanders *v.* Lamphear, *sup.*

[2] Hubbard *v.* Hubbard, 12 Allen, 590.

[3] Marsh *v.* Austin, 1 Allen, 235; Gibson *v.* Taylor, 6 Gray, 310; Holmes *v.* Fisher, 13 N. H. 9.

[4] Wilder *v.* Whittemore, 15 Mass. 262; Fiske *v.* Fiske, 20 Pick. 499; Austin *v.* Austin, 9 Vt. 420; Bethlehem *v.* Annis, 40 N. H. 44; Bryant *v.* Erskine, 55 Me. 157.

secured is not paid at a time prescribed, and that a sale made by virtue of such a power may create a valid and absolute estate in the purchaser.[1] And where a mortgagee, under a mortgage with a power of sale, sold and conveyed the estate to the mortgagor's wife, it was held to be as valid a sale as if she had not been thus connected.[2] And the power of sale may be valid, though it be not coextensive with the condition of the mortgage.[3] So, though the mortgage be for life only, as to one, his successors and assigns, the power of sale contained in it may empower the mortgagee to convey a fee in the premises.[4] The courts of Virginia were slow to admit the power, but in more recent cases have held, that, if the mortgagor acquiesces in the sale, he cannot disturb the purchaser.[5] In Vermont, the courts were reluctant to admit the principle of such a sale, and still hold that it "ought not to be recognized in any case, unless it is conveyed by an express grant, and in clear and explicit [*499] terms."[6] *And chancery will interpose to prevent the exercise of such a power in an oppressive manner.[7]

2. In executing a power of sale, a mortgagee is the trustee of the debtor, and must act *bona fide* and adopt all reasonable modes of proceeding to render the sale most beneficial to the debtor.[8] It is competent for the parties to fix the terms on

[1] Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Crabb, Real Prop, 848; Eaton *v.* Whiting, 3 Pick. 484; 2 Greenl. Cruise, 78, 79, n.; Croft *v.* Powel, Com. Rep. 603; Coote, Mortg. 124; Id. 130, n.; Longwith *v.* Butler, 3 Gilm. 32; Kinsley *v.* Ames, 2 Met. 29; Bloom *v.* Van Rensselaer, 15 Ill. 503; Mitchell *v.* Bogan, 11 Rich. L. 686; Smith *v.* Provin, 4 Allen, 518; Walthall's Ex'rs *v.* Rives, 34 Ala. 91; Fanning *v.* Kerr, 7 Iowa, 462.

[2] Field *v.* Gooding, 106 Mass. 310.

[3] Butler *v.* Ladue, 12 Mich. 173. But the mortgagee cannot sell less than the whole title of the mortgagor and himself to the land mortgaged. Torrey *v.* Cook, 116 Mass. 165.

[4] Sedgwick *v.* Laflin, 10 Allen, 430.

[5] Chowning *v.* Cox, 1 Rand. 306; Taylor *v.* Chowning, 3 Leigh, 654.

[6] Wing *v.* Cooper, 37 Vt. 184.

[7] Matthie *v.* Edwards, 2 Coll. 465; Platt *v.* McClure, 3 Woodb. & M. 151; 2 Greenl. Cruise, 79, n.

[8] Howard *v.* Ames, 3 Met. 311; Robertson *v.* Norris, 1 Giffard, 424; Jenkins *v.* Jones, 2 Giffard, 108.

which the sale is to be made; and the terms of this power must be strictly pursued, or the sale will be void.[1]

3. Such a power is coupled with an interest, and is appendant to the estate, and irrevocable. It consequently passes with the estate by assignment, nor does it die with the mortgagor. The estate in such case passes to the mortgagee like a devise to executors, with power of sale. The mortgagee may sell after the death of the mortgagor.[2] Such a sale, if made by the mortgagee in his own name, being under a power coupled with an interest, would be valid. So if the mortgagee assigns his mortgage, his assignee may sell in his own name. And if a wife join with her husband in a mortgage of his land, with a power of sale, and the sale be made, it will bar her dower.[3] If a mortgage be made to a married woman, with a power of sale upon the non-payment of the debt, and she make the sale in her own name, without joining her husband, it would be a good execution of the power, and a valid conveyance. It is not her real estate which is sold under these circumstances.[4] And if the power in the mortgage authorizes the mortgagee to sell in his own name, and the mortgagor die before the sale, the mortgagee may sell in his own name.[5] In Texas, such a power determines upon the death of the mortgagor. But in Iowa it survives to the administrator of the mortgagee, if named in the mortgagee's

[1] Longwith *v.* Butler, 3 Gilm. 32, 39; Cooper *v.* Crosby, 3 Gilm. 508; Roarty *v.* Mitchell, 7 Gray, 243; Smith *v.* Provin, 4 Allen, 518; Bradley *v.* Chester Valley R. R. Co., 36 Penn. St. 141, 151. The omission which avoided the sale in the case of Smith *v.* Provin was that of an affidavit and record of the sale as provided in the deed.

[2] Bergen *v.* Bennett, 1 Caines' Cas. 1; Wilson *v.* Troup, 2 Cow. 236. In Alabama and Wisconsin, a power of sale contained in a mortgage follows the assignment of the debt by force of the statute. Code, 1867, § 1589; Wisconsin, Rev. Stat. 1858, c. 85, § 60. And that such a power is irrevocable, and may be exercised after the death of mortgagor, Beatie *v.* Butler, 21 Mo. 313, 319; Hunt *v.* Rousmanier, 8 Wheat. 174; *post*, p. *316, *324; Hannah *v.* Carrington, 18 Ark. 104; Wilburn *v.* Spofford, 4 Sneed, 698, 704; Bonney *v.* Smith, 17 Ill. 533; Jeffersonville Association *v.* Fisher, 7 Ind. 699, 702; Robertson *v.* Gaines, 2 Humph. 307.

[3] Strother *v.* Law, 54 Ill. 413, 418; Mason *v.* Ainsworth, 58 Ill. 163.

[4] Cranston *v.* Crane, 97 Mass. 459, 465.

[5] Varnum *v.* Meserve, 8 Allen, 158.

deed.[1] Nor is the power of sale by a mortgagee within the rule against perpetuities.[2]

4. If a mortgagee, with such a power, conveys the whole of his estate, the power passes with it. But being in its nature an indivisible thing, if he convey a part only, he does not confer a power *pro tanto* upon his grantee. In such a case, the mortgagee may still execute the power, so far as title is concerned, but not so as to interfere with the possession which he has parted with to another; that is, the grantor shall not defeat his own grant. The case put by way of illustration is, a lease by a mortgagee, who has a power of sale, of a part of the mortgaged premises, and a subsequent sale by him of the whole estate.[3] In Illinois, if one holding a mortgage with a power of sale assign the note thereby secured, the right to sell the estate under the mortgage passes thereby to the assignee, and he alone can make the sale.[4] An agreement by the mortgagor with the assignee of such a mortgage to pay a different sum, and at a different time from that stipulated in the mortgage, was held not to impair the right of sale under the power contained in the mortgage.[5]

5. Such a mortgagee, therefore, or his assigns, has [*500] no *occasion to join the mortgagor in a conveyance of the estate. And where a purchaser under such a sale refused to complete it, on the ground that the mortgagor had not concurred in making it, the court, upon a bill filed, decreed a specific performance; and where such purchaser, in a bill for specific performance, made the mortgagor a party,

[1] Robertson *v.* Paul, 16 Tex. 472; Fanning *v.* Kerr, 7 Iowa, 450; Collins *v.* Hopkins, 7 Iowa, 463. The language of the court of Pennsylvania upon this subject, after stating that such a power has come into use there within a few years, is, "It being a power annexed to the estate and coupled with an interest, it is necessarily irrevocable. It becomes a part of the mortgage security, and vests in any person who, by assignment or otherwise, becomes entitled to the money secured to be paid." "The sale that is made in pursuance of it is virtually a foreclosure of the mortgagor's equity of redemption." Bradley *v.* Chester Valley R. R. Co., 36 Penn. St. 151; Brisbane *v.* Stoughton, 17 Ohio, 488.

[2] Gilbertson *v.* Richards, 5 H. & N. 453, 459; Briggs *v.* Earl of Oxford, 1 De G. McN. & G. 370.

[3] Wilson *v.* Troup, 2 Cow. 236; Jencks *v.* Alexander, 11 Paige, Ch. 619.

[4] Hamilton *v.* Lubukee, 51 Ill. 419; but see Stanley *v.* Kempton, 59 Me. 472.

[5] Young *v.* Roberts, 15 Beav. 558, s. c. 21 E. L. & E. 571.

the court dismissed the bill.[1] If, however, the power be not in the deed itself, but in a separate instrument, the purchaser might insist that the mortgagor should be a party to the conveyance.[2]

6. If upon making sale of the estate under a power in a mortgage there is a surplus, after satisfying the debt, the same will be in the mortgagee's hands as trustee of him to whom the equity of redemption would have belonged. Consequently, if the mortgagor were dead when the sale was made, his heir, and not his executor, might claim the surplus.[3] And a purchaser of the mortgagor's equity of redemption would be entitled to such surplus.[4] But if there are several mortgages, and the sale be made upon the first of these, the holder of the equity of redemption could only claim the surplus, if any, which remained after satisfying all the existing mortgages.[5] But the wife of one who was the owner of an equity of redemption of an estate which had been mortgaged by his grantor, with power of sale, which power had been executed, and a surplus remained in the mortgagee's hands, was held not to be entitled to have any part of such surplus secured to her by virtue of her inchoate right of dower.[6] But a purchaser would not be obliged to see to the application of the purchase-money. And though the mortgagor has a right to insist upon being paid any surplus arising from the sale of the premises, after paying the incumbrance in money, the mortgagee may sell upon credit, accounting for such surplus in money.[7] As has been before suggested, the same rule in equity applies in respect to sales made by mortgagees under powers as is applied in sales by trustees, so far as having a right themselves to become purchasers is concerned. And courts of equity will set aside a sale under a mortgage, on

[1] Corder *v.* Morgan, 18 Ves. 344; Clay *v.* Sharpe, cited 18 Ves. 345, n., Sumner's ed.

[2] Croft *v.* Powel, Com. Rep. 603.

[3] 2 Cruise, Dig. 79, § 45; Wright *v.* Rose, 2 Sim. & S. Ch. 323. See Varnum *v.* Meserve, 8 Allen, 160, as to dividing the proceeds of such sale among parties interested.

[4] Butrick *v.* Wentworth, 6 Allen, 79.

[5] Andrews *v.* Fish, 101 Mass. 424. [6] Newhall *v.* Lynn Bank, 101 Mass. 431.

[7] Bailey *v.* Ætna Ins. Co., 10 Allen, 288.

account of fraudulent mismanagement, unfair conduct, or departure from the power on the part of the mortgagee.[1] Thus, where the power was to sell the premises and all benefit and equity of redemption, and the sale was of the equity alone, it was held to be void as not within the power.[2] The assignee of such a mortgage may execute it without having recorded the assignment. And if he enter under the mortgage, and receive rents with a view to foreclose it, but afterwards sell the estate under his power, it will not affect the title of a purchaser under such a sale who is not cognizant of the fact, though the rents thus received, if they had been applied, would have exceeded the debt. Nor would a tender of the debt render a subsequent sale by the mortgagee void in the hands of an innocent purchaser, unless such tender were at once followed by proceedings to redeem the estate. The mortgagor, under such circumstances, should attend the sale, and give notice of the tender. Nor could he object to the sale on the ground that the mortgagee was the purchaser, if the estate had, in the mean time, passed into the hands of an innocent purchaser.[3] If the debt secured by the mortgage be tendered when it falls due, and before condition broken, the power is thereby extinguished. But a tender after condition broken does not affect the right in the mortgagee to make a sale under his power, unless the mortgagor, after having made such sale, shall have commenced a bill in equity to redeem the estate.[4] And an innocent purchaser will not be affected by a trustee, who in his deed has a general power of sale, violating any restrictions imposed upon him unless known to such purchaser.[5] A power to sell, in such cases, includes that of executing a proper deed to convey the estate.[6] And if the terms of the power be to make the sale "according to law," it will be understood as the law in force when the sale is made, rather than the one in force when the mortgage was executed.[7] If the sale is made in good faith by an officer of

[1] Longwith *v.* Butler, 3 Gilm. 42, 44. [2] Fowle *v.* Merrill, 10 Allen, 350.
[3] Montague *v.* Dawes, 12 Allen, 397; s. c. 14 Allen, 373.
[4] Cranston *v.* Crane, 97 Mass. 459, 465.
[5] Beatie *v.* Butler, 21 Mo. 320. [6] Fogarty *v* Sawyer, 17 Cal. 591.
[7] James *v.* Steele, 9 Barb. 482; Cockery *v.* Hart, 4 Kern. 22; Heyward *v.* Judd, 4 Minn. 483.

the law, it seems that the mortgagee may himself be the purchaser. But if, as trustee of the mortgagor, as he would be, acting under a power of sale to him as mortgagee, he sell the estate, directly or through his own agent, and directly or indirectly becomes the purchaser, the mortgagor may, if he sees fit, avoid such sale through the intervention of a court of equity. But the sale will be good until thus avoided.[1] It was held in New York, that where in a mortgage of land in the Caribbean Sea, to secure a debt, a power of sale was inserted authorizing it to be made at a public sale, and giving the mortgagee a right to be a bidder at such sale, and he did so, the conveyance was a valid one, and that the mortgagor was bound by the agreement.[2] But a mortgagee under a power of sale has no right to purchase the estate, unless there be an agreement to that effect in the mortgage itself; and this restriction extends to his agent, assignee, and trustee.[3] In the making sale under a power contained in a mortgage, the power must be strictly pursued as to time, place, and manner of sale, or the sale will be void.[4] The mere purchase by the mortgagee of the mortgaged estate from the one who bids it off at his sale will not affect the validity of his title. But the mortgagee with a power must exercise it in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. If he uses his power for any other purpose than to secure repayment of his mortgage-money, as, for instance, to exclude the mortgagor from the premises, for ulterior purposes in the mortgagee or those for whom he acts, it would be a fraud, for which the court would set aside the sale, and permit the mortgagor to redeem. And in the case cited below, this was done after a lapse of fifteen years, the property sold having been certain shares in the stock of the "Railway Times."[5] And

[1] Downes *v.* Grazebrook, 3 Meriv. 207; Ramsey *v.* Merriam, 6 Minn. 168; Blockley *v.* Fowler, 21 Cal. 329; Davoue *v.* Fanning, 2 Johns. Ch. 257; Michoud *v.* Girod, 4 How. 553; Scott *v.* Freeland, 7 Sm. & M. 418; Jackson *v.* Walsh, 14 Johns. 415; Patten *v.* Pearson, 57 Me. 435.

[2] Elliot *v.* Wood, 45 N. Y. 71, 79.

[3] Hall *v.* Towne, 45 Ill. 493; Roberts *v.* Fleming, 53 Ill. 196, 200.

[4] Strother *v.* Law, 54 Ill. 413, 418; Hall *v.* Towne, *sup.*

[5] Robertson *v.* Norris, 1 Giffard, 421, 424.

similar doctrines are maintained in respect to the sale of real estate in Downes *v.* Grazebrook, where the Chancellor set aside a sale by a mortgagee, where the purchase was made by his solicitor, "although there was not the slightest ground for imputing to the defendant either fraud, oppression, or harshness of conduct, towards the plaintiff." [1]

7. If one is intrusted to sell property by another, and directly or indirectly becomes himself the purchaser at such sale, it is, *ipso facto*, so far a fraud that any one interested in it, as *cestui que trust*, may avoid it at his election. This may be done in respect to sales by mortgagees except in cases provided for by statute, the mortgagor still having a right to redeem as before the sale if he elects so to do.[2] By the statutes of several of the States the mortgagee may himself be the purchaser,[3] or he may secure this privilege to himself by the terms of the power of sale.[4] But the mortgagee in such case must exercise good faith and a suitable regard to the interests of his principal, or a court of equity will set aside a sale and purchase made by him. When a party, who is intrusted with a power to sell, attempts also to become a purchaser, he will be held to the strictest good faith, and the utmost diligence for the protection of the rights of his principal.[5] So where one having a mortgage upon a large and valuable estate, in order to foreclose it, under the law of New York, was about to sell it, and a junior mortgagee requested him to sell a part only of the estate which was sufficient to satisfy the first mortgage debt, and offered to bid and pay enough to satisfy the debt, but the mortgagee refused, and sold

[1] Downes *v.* Grazebrook, 3 Meriv. 209. See also Jenkins *v.* Jones, 2 Giffard, 108.

[2] Jennison *v.* Hapgood, 7 Pick 1; Downes *v.* Grazebrook, 3 Meriv. 200; Howard *v.* Ames, 3 Met. 308; Middlesex Bank *v.* Minot, 4 Met. 325; Benham *v.* Rowe, 2 Cal. 387; Hyndman *v.* Hyndman, 19 Vt. 9; Dobson *v.* Racey, 3 Sand. Ch. 60; Waters *v.* Groom, 11 Clark & F. 684. Though in the following cases the courts held that such a sale and purchase could only be impeached by showing unfairness. In Richards *v.* Holmes, 18 How. 143, the sale was made by an auctioneer, and the mortgagee bid through him. Howards *v.* Davis, 6 Tex. 174; Blockley *v.* Fowler, 21 Cal. 326; Hamilton *v.* Lubukee, 51 Ill. 420.

[3] New York, Rev. Stat. 1863, vol. 2, p. 566; Mich. Comp. 1871, p. 1923; Elliot *v.* Wood, 45 N. Y. 79; Minnesota, Stat. at Large, 1873, p. 902; Wisconsin, Rev. Stat. 1858, c. 154, § 9.

[4] Montague *v.* Dawes, 12 Allen, 400. [5] Montague *v.* Dawes, 14 Allen, 373.

the whole, it was held to be an invalid sale.[1] Without * such authority, however, no one but the mort- [*501] gagor can complain of such sale and purchase;[2] and whoever would object to such sale must do it within a reasonable time after it is made, or he may not do it at all;[3] and if neither a statute nor the terms of the power require the sale to be by public auction, a private sale will be valid as well as one at auction.[4] And where the mortgage was to secure several notes, and the sale was made for non-payment of the first, it had the effect to discharge the estate from any further liability on account of the other notes.[5] But where a mortgagee in possession under a power of sale sold a part of the premises for a sum larger than the amount *then* due upon the debt secured, it was held that he must apply the surplus upon the rest of his debt, or pay it over to the mortgagor.[6] In some of the States there are statute regulations in respect to the mode of making such sales; and where that is the case, these must be complied with in order to make the sale valid. Thus it has been held in New York, that a private sale, without notice, would not bar the mortgagor's equity of redemption, although in accordance with the terms of the power, being in a contravention of the statute requirements.[7] But a failure to register the power, though required by the statute, does not invalidate the sale.[8]

8. The insertion of a power of sale in a mortgage deed does not change or affect the mortgagor's right to redeem, so long as the power remains unexecuted,[9] or the mortgage is not, as

[1] Ellsworth *v.* Lockwood, 42 N. Y. 96.

[2] Edmondson *v.* Welsh, 27 Ala. 578; Benham *v.* Rowe, 2 Cal. 387.

[3] Patten *v.* Pearson, 60 Me. 223.

[4] Davey *v.* Durrant, 1 De Gex & J. Ch. 535.

[5] Smith *v.* Smith, 32 Ill. 198.

[6] Thompson *v.* Hudson, L. R. 10 Eq. 497; McDowel *v.* Lloyd, 22 Iowa, 450.

[7] 1 Rev. Stat. 473; 2 Id. 565; Lawrence *v.* Farmers' Loan and Trust Co., 3 Kern. 200.

[8] Wilson *v.* Troup, 2 Cow. 195. In Michigan, the statute points out the measures to be adopted in executing a power of sale in a mortgage, and provides that the mortgagor, after such sale, may redeem the land by paying what it was bid off for, within one year. Doyle *v.* Howard, 16 Mich. 264, 265.

[9] Eaton *v.* Whiting, 3 Pick. 484; Turner *v.* Bouchell, 3 Har. & J. 99; Benham *v.* Rowe, 2 Cal. 387; Michoud *v.* Girod, 4 How. 503, 556; Mapps *v.* Sharpe, 32 Ill. 21.

it may be, foreclosed in the ordinary manner.[1] Therefore, suing the mortgage debt, and recovering judgment upon it, does not impair the right in the mortgagee to sell the estate under a power of sale in the mortgage.[2] Nor does it stand in the way of foreclosing such mortgage in the ordinary mode by judicial process of foreclosure. In Massachusetts there are special statute provisions in respect to foreclosing such mortgages by sale of the premises.[3]

9. But when the sale has been made, the interest of the mortgagor is wholly divested, including all right of redemption.[4] Thus, where a mortgagee in 1868, under a mortgage with a power of sale dated in 1866, made a sale and conveyance, it was held to give the purchaser a title prior to that of a deed made by the mortgagor in 1867.[5] And if a mortgaged estate be sold to satisfy an instalment of the debt secured by it, the estate is thereby discharged from the mortgage lien, and the purchaser acquires an absolute title to the same.[6] Nor does a conveyance by the mortgagor, and an exclusive possession by his grantee, work a disseisin as to the mortgagee, or affect his right to sell the premises under the power in his mortgage.[7] In order, however, to produce this effect, the essential requisites of the power must be complied with, since, unless that is done, the sale will not pass any title to the purchaser.[8] This power of sale is a part of the mortgagee's

[1] Carradine *v.* O'Connor, 21 Ala. 573. The power of sale being a cumulative remedy, not affecting the jurisdiction of chancery. Walton *v.* Cody, 1 Wis. 420; Cormerais *v.* Genella, 22 Cal. 124.

[2] Hewett *v.* Templeton, 48 Ill. 370.

[3] Morrison *v.* Bean, 15 Tex. 267; Butler *v.* Ladue, 12 Mich. 173, 12 Am. Law Reg. 248. See Heyward *v.* Judd, 4 Minn. 493–495; Mass. Gen. Stat. c. 140, §§ 38–44; Childs *v.* Dolan, 5 Allen, 319.

[4] Kinsley *v.* Ames, 2 Met. 29; Eaton *v.* Whiting, 3 Pick. 484; Turner *v.* Johnson, 10 Ohio, 204; Bloom *v.* Van Rensselaer, 15 Ill. 503; Jackson *v.* Henry, 10 Johns. 185.

[5] Lydston *v.* Powell, 101 Mass. 78.

[6] Poweshick *v.* Dennison, 36 Iowa, 244; Codwise *v.* Taylor, 4 Sneed, 349.

[7] Sheridan *v.* Welch, 8 Allen, 166.

[8] Ormsby *v.* Tarascon, 3 Litt. 404; Ivy *v.* Gibert, 2 P. Wms. 13; Mills *v.* Banks, 3 P. Wms. 1. Thus, where a mortgagee was authorized upon default to enter, take possession, and sell the premises, a sale before making an entry and taking or demanding possession was invalid. Roarty *v.* Mitchell, 7 Gray, 243; Simson *v.* Eckstein, 22 Cal. 590; Jackson *v.* Clark, 7 Johns. 226; Denning *v.* Smith, 3 Johns. Ch. 345.

security, an interest in land, and is protected against a prior unregistered * deed.[1] So an assignment of a [*502] mortgage is an assignment of a power of sale contained in it.[2]

10. But such power is extinguished by the payment of the mortgage debt, even against a *bona fide* purchaser.[3] And a tender of the debt and costs secured by a prior mortgage, by the holder of a subsequent one, extinguishes the power of sale in the first.[4] In a subsequent case, the court, commenting upon the doctrine of Cameron *v.* Irwin, limit it to this extent: If the mortgage be paid, and then the mortgagee, without notice to the mortgagor, proceeds to sell, the sale would be void, even against a *bona fide* purchaser. But if the mortgagor, knowing of the sale, stand by and allow it to be made without objection, he would be barred by it. And this doctrine, thus limited, is applied to all cases of sales for purposes of foreclosure and purchases made *bona fide*. The title thereby acquired will be valid though the mortgage may have been paid, provided subsequent incumbrances, or persons having an interest in the estate, and knowing of such process, neglect to make defence to it, though parties who were not notified might object to the validity of the sale.[5] It was held in Jenkins *v.* Jones that a sale made by a mortgagee under a mortgage, with power of sale, after a tender by the mortgagor of the debt due, would be set aside as oppressive by the court, if it could be done without injustice to the purchaser. If, however, circumstances which put in question the propriety of the sale are brought to his knowledge, and he purchases with that knowledge, he becomes a party to the transaction which is impeached. This knowledge on the part of the purchaser puts him in exactly the same situation as the persons from whom he was about to purchase. And in that case the

[1] Bell *v.* Twilight, 2 Fost. (N. H.) 500; Beatie *v.* Butler, 21 Mo. 313; Bunce *v.* Reed, 16 Barb. 347.

[2] Slee *v.* Manhattan Co., 1 Paige, Ch. 48.

[3] Cameron *v.* Irwin, 5 Hill, 272; Charter *v.* Stevens, 3 Denio, 33; Lowe *v.* Grinnan, 19 Iowa, 192.

[4] Burnet *v.* Denniston, 5 Johns. Ch. 35. See Jenkins *v.* Jones, 2 Giffard, 99; Cranston *v.* Crane, 97 Mass. 459; *ante*, p. *500.

[5] Warner *v.* Blakeman, 36 Barb. 501, 517.

sale was set aside, although the plaintiff's bill for the purpose was not filed till twelve months after the sale.[1]

11. In connection with the subject of mortgages with powers of sale is that of deeds of trust in the nature of mortgages, where the deed, instead of being made to the mortgagee himself, is made to some third person or persons, containing the declaration of trust, which the trustees, by accepting it, become bound to execute. The terms of this trust are, usually, that the trustee shall reconvey to the grantor, upon his performing that which it is intended to secure, or, upon failure thereof, to sell the estate, and apply the proceeds in satisfaction of such default. This class of trust deeds are often applied in cases of railroad and other large corporations wishing to raise moneys upon the security of their property, and are not infrequent in many of the States as a mode of securing the performance of conditions in the place of formal mortgages. Though of the nature of mortgages, and by some of the cases treated as identical with them,[2] the better opinion seems to be that they are rather like mortgages than mortgages in fact. If such a mortgage is given to secure several notes, and one of them is assigned, it is an equitable assignment of the security also *pro rata*.[3] Thus, it is uniformly held wherever they have been adopted, that such deeds vest in the trustee an actual legal estate, and not a mere mortgagee's lien.[4] But by statute in Mississippi, if the title of the *cestui que trust* is superior to the legal title, the holder thereof shall only enforce his right through a court of equity, whereas in ejectment it is the legal title only that is in issue.[5] But it is competent for the grantor, in a deed of trust mortgage, to authorize the trustee to sell the estate, or, in a certain prescribed contingency, to have this power executed by another,

[1] Jenkins *v.* Jones, 2 Giffard, 99, 108.

[2] Sargent *v.* Howe, 21 Ill. 149; Hannah *v.* Carrington, 18 Ark. 106; Woodruff *v.* Robb, 19 Ohio, 212; Coe *v.* McBrown, 22 Ind. 257; Coe *v.* Johnson, 18 Ind. 218; Richards *v.* Holmes, 18 How. 147; Thornton *v.* Boyden, 31 Ill. 200; Newman *v.* Samuels, 17 Iowa, 536. See also a full and learned article by Judge Dillon, of Iowa Sup. Court, upon trust mortgages and mortgages with powers of sale, 11 Am. Law Reg. 641–658.

[3] Chappell *v.* Allen, 38 Mo. 213.

[4] Devin *v.* Hendershott, 32 Iowa, 194.

[5] Heard *v.* Baird, 40 Miss. 799.

and a deed by the latter may pass a good title. As where the debtor made a deed of trust by way of mortgage to a trustee, with power of sale, and provided that if the trustee was absent the sheriff of the county might proceed to sell for the payment of the debt, and he did so, it was held a good execution of the power.[1] But where the deed was to such trustee to have and to hold, to him, his heirs, executors, and *assigns*, and he conveyed the estate to another to act as trustee in executing the trust by making sale of the same, it was held that he had no right to make such conveyance, nor to clothe another by delegation with the power of making the sale in execution of the trust.[2] The terms of the deed fix the rights of the grantor as to redemption of the estate, as well as the rights and duties of the trustee in doing what answers to a foreclosure of the same by a sale of the premises. And courts may enforce this sale even where they have no general authority to cause sales to be made for the purpose of foreclosing mortgages.[3] The test as given in one of the cases is, if the trust is to be executed by the creditor, it is a mortgage. If by a third party, it is a trust.[4] It has accordingly been held that, after making such a deed, the grantor has nothing in the estate conveyed which is the subject of levy in favor of an execution creditor.[5] If, however, the debt has been paid in full, the grantor's equitable right is something which may be levied upon, or the purchaser may reach the estate through a court of equity. But the payment of the debt does not, of itself, revest the legal title in the grantor, without a release or satisfaction entered of record, or a reconveyance.[6] Such conveyance would be good if accepted by the trustee, although he do not himself sign the deed. And

[1] McKnight *v.* Wimer, 38 Mo. 132, overruling Miller *v.* Evans, 35 Mo. 45.

[2] Whittlesey *v.* Hughes, 39 Mo. 13, 20; Beal *v.* Blair, 33 Iowa, 321.

[3] Reece *v.* Allen, 5 Gilm. 236, 240; Bradley *v.* Chester Valley R. R. Co., 36 Penn. St. 141; Koch *v.* Briggs, 14 Cal. 256, 263; Sampson *v.* Pattison, 1 Hare, 536; Newman *v.* Jackson, 12 Wheat. 572; Brown *v.* Bartee, 10 Sm. & M. 275; Brisbane *v.* Stoughton, 17 Ohio, 488; Pettit *v.* Johnson, 15 Ark. 55, 58; Marvin *v.* Titsworth, 10 Wis. 320, 328; Heard *v.* Baird, 40 Miss. 796.

[4] Marvin *v.* Titsworth, *sup.*

[5] McIntyre *v.* Agricultural Bank, 1 Freem. Ch. (Miss.) 105; Pettit *v.* Johnson, *sup.*; Morris *v.* Way, 16 Ohio, 469.

[6] Heard *v.* Baird, 40 Miss. 796, 799.

the trustee may foreclose without the aid of the court, upon complying with the terms of the deed in making the sale. And, if he declines to do so, he may be compelled to execute the trust by the intervention of the court.[1] And if one of two or more trustees appointed under such a deed of trust die before the trusts are executed, the trust survives, and may be executed by the survivors.[2] These trust mortgages, as they are commonly called, may be made to secure future advances as well as present loans. And in Ashhurst *v.* Montour Iron Co., the deed was to secure the payment of bonds yet to be made, which the company, the grantors, were to dispose of in market, and in it the trustees were to sell the estate either with or without process of court. In Koch *v.* Briggs, above cited, there was a loan of money payable at a specified time. The borrower, to secure this, made a deed of trust, by which the trustee, upon failure of payment by the grantor, was, upon the application of the creditor, the *cestui que trust*, to make sale in a manner prescribed, and out of the proceeds to pay the sum loaned. The court held that no process would lie for foreclosing the estate, either according to the common-law mode, as it may be called, of strict foreclosure in equity, nor that of the State in which the land lay, by a decree of sale of the premises, because whatever was to be done must be based upon the agreement of the parties, which equity could only enforce by compelling the execution of the trust. Nor could there be an equity of redemption if the trust were executed, for, there being no forfeiture, there was nothing to relieve against. The trust, moreover, in such cases, is not between the debtor and creditor, but between the debtor or mortgagor and the trustee, and the creditor or mortgagee and the trustee respectively.[3] The property being held in trust, first, for the payment of the debt, second, for the grantor, a sale by the trustee, after a satisfaction of the debt, would be void, the trust being thereby so far rendered

[1] Leffler *v.* Armstrong, 4 Iowa, 482; Bradley *v.* Chester Valley R. R. Co., 36 Penn. St. 141.

[2] Hannah *v.* Carrington, 18 Ark. 104; Peter *v.* Beverly, 10 Peters, 565; Franklin *v.* Osgood, 14 Johns. 527, 553.

[3] Wilson *v.* Russell, 13 Md. 494, 536; Ashhurst *v.* Montour Iron Co., 35 Penn. St. 30; Bradley *v.* Chester Valley R. R. Co., *sup.*; Koch *v.* Briggs, *sup.*

null.[1] As a consequence of this double character in the trust in such cases, trustees were considered the agents of both parties, debtor and creditor, and their action in performing the duties of their trust should be conducted with the strictest impartiality and integrity, and courts of equity watch their proceedings with a jealous and scrutinizing eye.[2] It has been generally held, therefore, that he cannot become a purchaser of the estate; and whether the creditor in whose favor the trust is created can become a purchaser at a sale thereof at auction or not, has been variously held, depending upon whether, in making such sale, the trustee acted independently of any control or direction of the creditor, as well as fairly, or whether the creditor had the power to control the sale.[3]

[1] Lowe *v.* Grinnan, 19 Iowa, 197; Heard *v.* Baird, 40 Miss. 798; Thornton *v.* Boyden, 31 Ill. 210.

[2] Goode *v.* Comfort, 39 Mo. 325.

[3] Davoue *v.* Fanning, 2 Johns. Ch. 252; Iddings *v.* Bruen, 4 Sand. Ch. 223; Thornton *v.* Irwin, 43 Mo. 153; Bloom *v.* Van Rensselaer, 15 Ill. 503; Richards *v.* Holmes, 18 How. 143; Wade *v.* Harper, 3 Yerg. 383; Hughes *v.* Lyon, 6 Ves. Jr. 617.

SECTION III.

EQUITABLE MORTGAGES.

1. Of security by deposit of title-deeds.
2, 3. What necessary to create a lien thereby.
4, 5. How far available in this country.
6. How such lien may be enforced.
7. Of vendor's lien for purchase-money.
8. Who affected by it.
9. How far it prevails in this country.
10. How far a mere lien, and not an estate.
11–13. Against whom it avails.
14. Does not avail against *bona fide* purchasers.
15. Can only be enforced in equity.
16. How it may be defeated.
17. Does not arise in favor of a stranger.
18. How far assignable and how far personal.
19. Of purchaser's lien for money advanced.
20. How such a lien is enforced.

1. BESIDES the mortgages which have been above described, there are two species of lien upon real estate recognized by equity as a security for the payment of money, and treated in the light of equitable mortgages. One of these is created by a deposit of the title-deeds of an estate with the lender of money. The other is raised in favor of a vendor of real estate as security for the purchase-money due from the purchaser. In respect to the first, equity regards it as an agreement to make a mortgage by the borrower to the lender, when he deposits his title-deeds with him as security for the loan, and will enforce it against the mortgagor and all persons claiming under him with notice.[1] This doctrine of creating a lien in the nature of a mortgage, by a simple deposit of the title-deeds of an estate, has been strongly opposed by

[1] Story, Eq. Jur. § 1020; Russel *v.* Russel, 1 Bro. Ch. 269, and Perkins' note and cases cited. This, in 1783, was the first case in which the law was stated. Langston, *Ex parte*, 17 Ves. 230; Pain *v.* Smith, 2 Mylne & K, 417; Mandeville *v.* Welch, 5 Wheat. 277. It is not necessary that the deed deposited should, in order to create an equitable mortgage, show a good title in the depositor. Roberts *v.* Croft, 24 Beav. 223; Edge *v.* Worthington, Cox, 211; Corning, *Ex parte*, 9 Ves. Jr. 115, and cases cited in note.

many able jurists. * Lord Eldon esteemed it as a [*503] practical repeal of the statute of frauds.[1] A pledge of a lease by merely delivering it to the pledgee was held to be a good mortgage of the leasehold estate as against the assignee in bankruptcy of the pledgor, who had subsequently become bankrupt.[2]

2. To give the effect of a lien to the possession of title-deeds, it must be shown affirmatively that they were deposited as a *bona fide*, present, immediate security. If left, for instance, with the attorney for the purpose of his drawing a mortgage which had been agreed upon by the parties, it will not be sufficient. Mere possession even by a creditor is not enough.[3] Nor can such a lien avail against an actual *bona fide* registered mortgage by one without notice, though against a creditor who subsequently levies his execution it may.[4] Under the English system, questions have arisen how far a mortgagee would be postponed in his security, if he leaves the mortgagor's title-deeds in his possession, and he, by means of it, obtains a second loan, and makes a second mortgage upon the same premises.[5] In this country, it would seem that the principle would not apply, the party making the loan having the registry of deeds to guide him, without any occasion to refer to the title-deeds of his mortgagor.[6]

3. And the burden of proof is upon the equitable mortgagee to prove notice on the part of the subsequent legal mortgagee. What will amount to notice depends upon the circumstances of the case.* It is said that, if the owner's title-deeds

* Note. — For the principal proposition, see Hardy, *Ex parte*, 2 Deac. & C. 393. For cases illustrative of what would amount to notice, see Hiern *v.* Mill, 13 Ves. 114; Hewitt *v.* Loosemore, 9 E. L. & Eq. 35; Head *v.* Egerton, 3 P. Wms. 279; Adams, Eq. 123; Story, Eq. Jur. § 1020.

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[1] Whitbread, *Ex parte*, 19 Ves. 209. See also Haigh, *Ex parte*, 11 Ves. 403; Hooper, *Ex parte*, 19 Ves. 477; Norris *v.* Wilkinson, 12 Ves. 192.

[2] Russel *v.* Russel, 1 Bro. Ch. 269.

[3] Norris *v.* Wilkinson, 12 Ves. 192; Bozon *v.* Williams, 3 Younge & J. 150; Mandeville *v.* Welch, 5 Wheat. 277; Chapman *v.* Chapman, 3 E. L. & Eq. 70, s. c. 13 Beav. 308; Story, Eq. Jur. § 1020; 2 Crabb, Real Prop. 851. But see Edwards, *Ex parte*, 1 Deac. 611.

[4] Story, Eq. Jur. § 1020; Hall *v.* McDuff, 24 Me. 311; Whitworth *v.* Gaugain, 3 Hare, 416; Story, Eq. § 1503 b.

[5] Herrick *v.* Atwood, 25 Beav. 212; Colyer *v.* Finch, 5 H. L. Cas. 924, 928.

[6] Berry *v.* Mutual Ins. Co., 2 Johns. Ch. 604.

are in the hands of his solicitor, a deposit of a single title-deed, with an intent thereby to create a security on the whole estate, would be sufficient.[1] But where one owning lands deposited his title-deeds with his bankers as security for a loan, and then entered into a marriage settlement with the woman he was about to marry, covering these lands, and her solicitor, upon inquiring for these deeds, was told they had been deposited with the owner's bankers for safe custody, it was held that it was such negligence on her part in not pursuring the inquiry further, that she could not set up the claim of a *bona fide* purchaser without notice against the banker's lien for money lent.[2]

4. It was doubtful, until within a recent period, whether this species of lien or equitable mortgage was or would be recognized by any of the courts in this country as valid. It was expressly repudiated by the courts of Pennsylvania and Kentucky.[3] But though the deposit of title-deeds will not be held to create a mortgage in Pennsylvania, still, if it is accompanied by a written declaration, and an agreement to convey the land if the debt intended to be secured be not paid, and this is recorded in the proper registry of deeds, it will be treated as a mortgage.[4]

[*504] * 5. Indeed, it is not easy to see why such a doctrine should prevail in a country where the system of registration is universal, and where it must be carried out, if at all, in direct violence to the statute of frauds. But it has been recognized in several of the States as being in force. The power of creating a lien by the deposit and pledge of a title-deed seems to be recognized, though not applied, in Maine;[5] and the same may be said of the court in Mississippi;[6] though an intimation is made that a lien in the nature of an equitable mortgage may be valid under their

[1] Chippendale, *Ex parte*, 2 Mont. & A. 299; Wetherell, *Ex parte*, 11 Ves. 398.

[2] Maxfield *v.* Burton, L. R. 17 Eq. Cas. 15.

[3] Bowers *v* Oyster, 3 Penn. 239; Hale *v.* Henrie, 2 Watts, 143; Shitz *v.* Dieffenbach, 3 Penn. St. 233; Vanmeter *v.* McFaddin, 8 B. Mon. 435; Strauss' Appeal, 49 Penn. St. 358; Kauffelt *v.* Bower, 7 S. & R. 64.

[4] Luch's Appeal, 44 Penn. 522; Edwards *v.* Trumbull, 50 Penn. 512.

[5] Hall *v.* McDuff, 24 Me. 311.

[6] Williams *v.* Stratton, 10 S. & M. 418.

statute of frauds for the term of one year.[1] In Georgia, New Jersey,[2] and South Carolina,[3] the power to create such a lien is recognized, and is expressly sustained in New York,[4] though it is remarked by Comstock, J., that "we have no practice of creating liens in this manner," [5] and in Rhode Island.[6] The same is true of Wisconsin and Illinois.[7] The law is stated as doubtful in Vermont, while the remark of Mr. Walker upon the subject would apply in all the States: "This is called an equitable mortgage; but it is of little consequence in this country, owing to the difficulty of affecting another claimant with notice of such deposit." [8]

6. This may not be the place to discuss the question how such a lien or mortgage can be foreclosed, though some writers seem to assume that the mortgagee has the same rights in equity in respect to foreclosure as he would have if it were a legal mortgage. But the remedy, whatever it may be, must obviously be sought in equity alone.[9]

7. The other class of equitable mortgages above mentioned, which equity raises by way of lien in favor of a vendor for the payment of the purchase-money, rests upon the ground that the purchaser, in such case, is trustee of the premises for the vendor till the purchase-money is paid. In the language of one writer: "If I convey land to you, and take no collateral security for the payment of the purchase-money, you become a trustee for me until the purchase-money is paid." [10]

8. This right affects all purchasers having notice of its * existence,[11] and the vendor may, by virtue of it, [*505] enter and take the profits of the estate like a mort-

[1] Gothard *v.* Flynn, 25 Miss. 58.

[2] Mounce *v.* Byers, 16 Ga. 469; Robinson *v.* Urquhart, 1 Beasley (N. J.), 523.

[3] Welsh *v.* Usher, 2 Hill. Ch. 166–170.

[4] Rockwell *v.* Hobby, 2 Sandf. Ch. 9; Chase *v.* Peck, 21 N. Y. 584.

[5] Stoddard *v.* Hart, 23 N. Y. 561. [6] Hackett *v.* Reynolds, 4 R. I. 512.

[7] Jarvis *v.* Dutcher, 16 Wis. 307; Richards *v.* Leaming, 27 Ill. 431; Keith *v* Horner, 32 Ill. 526; Wilson *v.* Lyon, 51 Ill. 166.

[8] Bicknell *v.* Bicknell, 31 Vt. 498; Walker, Am. Law, 315.

[9] Adams, Eq. 125; Coote, Mortg. 220.

[10] Walker, Am. Law, 315; Mackreth *v.* Symmons, 15 Ves. 339; Chapman *v.* Tanner, 1 Vern. 267; Blackburn *v.* Gregson, 1 Bro. C. C. 420, and Perkins' notes; Story, Eq. Jur. § 1217; 2 Crabb, Real Prop. 852; Coote, Mortg. 218.

[11] Cator *v.* Pembroke, 1 Bro. C. C. 302, and note.

gagee.[1] If the transaction between the original parties be a contract of sale only, and the purchaser mortgage the estate to a third person who puts his deed upon record, the mortgage so far has effect, that the mortgagee has a right to purchase at the price agreed; and if the original parties rescind their contract, and the vendor sell to another, he takes the estate subject to this right in the first mortgagee.[2] But a mere recital in a vendor's deed that the purchase-money is unpaid would not bind subsequent purchasers, unless the payment of the purchase-money is expressly charged upon the purchaser.[3]

9. While it is doubtful if this class of equitable liens or mortgages exists in some of the States,[4] and in Maine it has been held not to exist,[5] in some the courts regard the lien as a trust incident, in equity, to all conveyances where the purchase-money has not been paid.[6] This was held to be the case in Pennsylvania and by the Supreme Court of the United States, though the purchaser be a *feme covert*, and though, in the former case, she had given a judgment bond for the purchase-money.[7] And in others it is treated as a simple equitable mortgage;[8] and others still, while they do not hold it as a mortgage, ascribe to it most of the incidents of a mortgage; though being merely a claim for a debt, it can only be enforced as long as the debt can be.[9] The doctrine is fully sustained by Redfield, J., in Vermont, who says: "It has existed in the English equity courts for centuries. It has been adopted in most of the American States whose equity systems may be regarded as at all settled, and in the national courts." And he cites cases from Tennessee, Kentucky, Maryland, Virginia,

[1] Irwin *v.* Davidson, 3 Ired. Eq. 311, 319. [2] Alden *v.* Garver, 32 Ill. 32.

[3] Hiester *v.* Green, 48 Penn. St. 102; Heist *v.* Baker, 49 Penn. St. 9; Strauss' Appeal, 49 Penn. St. 358.

[4] Wright *v.* Dame, 5 Met. 503. [5] Philbrook *v.* Delano, 29 Me. 410.

[6] Skaggs *v.* Nelson, 25 Miss. 88; Moreton *v.* Harrison, 1 Bland, 491; Iglehart *v.* Armiger, Id. 519; Pintard *v.* Goodloe, Hempstead (Ark.) 527; Tobey *v.* McAllister, 9 Wis. 463.

[7] Ramborger *v.* Ingraham, 38 Penn. St. 146; Chilton *v.* Braiden's Adm'x, 2 Black, 458.

[8] Wilson *v.* Davisson, 2 Rob. (Va.) 384; Haley *v.* Bennett, 5 Port. (Ala.) 452; Irwin *v.* Davidson, 3 Ired. Ch. 311; Kelly *v.* Payne, 18 Ala. 371.

[9] Trotter *v.* Erwin, 27 Miss. 772.

North Carolina, Connecticut, New York, and the United States Court;[1] and to these may be added Indiana, Illinois, Iowa, and California. In Maryland it was applied in case of a sale by one parcener of her interest in the estate to another parcener.[2] And in Mississippi it was applied, although the vendee did not hold by deed directly from the one who set up the lien as vendor. As where A gave land to B by parol, and B sold by parol to C, to whom A, by B's request, made a deed, C having failed to pay the purchase-money, it was held that B had a vendor's lien upon the premises.[3] But it does not exist in Kansas, and in Maryland it passes to the executor, and not to the heir of the vendor, and the same in Illinois.[4] It exists in Texas, but not against a *bona fide* purchaser from such vendee without notice, who has paid his purchase-money.[5]

10. The editors of the American edition of the Leading Cases in Equity regard this incidental right of a vendor as not being a lien, until his bill to assert it has been filed, but a mere equity or capacity of acquiring a lien and to have it satisfied;[6] and Judge Story does not regard it as an equitable estate in the land itself, though it is often spoken of as being such.[7]

11. This lien, as already remarked, takes effect against the vendee, his heirs and privies in estate, and against subsequent purchasers who have notice that the purchase-money remains unpaid.[8] Upon the question, what shall be sufficient notice in order to charge a second purchaser, it has been held that a

[1] Manly *v.* Slason, 21 Vt. 271, 278. See Ross *v.* Whitson, 6 Yerg. 50; Outtan *v.* Mitchell, 4 Bibb, 239; White *v.* Casanave, 1 Har. & J. 106; Wynne *v.* Alston, 1 Dev. Eq. 163; Watson *v.* Wells, 5 Conn. 468; Chase *v.* Peck, 21 N. Y. 584; Arnold *v.* Patrick, 6 Paige, 310; McLaurie *v.* Thomas, 39 Ill. 291.

[2] Thomas *v.* Farmers' Bank, 32 Md. 57.

[3] Russell *v.* Watt, 41 Miss. 604.

[4] Merritt *v.* Wells, 18 Ind. 171; Patton *v.* Stewart, 19 Ind. 236; Cowl *v.* Varnum, 37 Ill. 181; Richards *v.* Leaming, 27 Ill. 432; Grapengether *v.* Fejervary, 9 Iowa, 174; Baum *v.* Grigsby, 21 Cal. 176; Simpson *v.* Mundee, 3 Kans. 185; Hall *v.* Jones, 21 Md. 446, 447; Keith *v.* Horner, 32 Ill. 524.

[5] McAlpine *v.* Burnett, 23 Tex. 649.

[6] White & Tud. Lead. Cas. Am. ed. 241. [7] Gilman *v.* Brown, 1 Mason, 191.

[8] Pintard *v.* Goodloe, Hempstead (Ark.) 527; Webb *v.* Robinson, 14 Ga. 216; Garson *v.* Green, 1 Johns. Ch. 308; Wade *v.* Greenwood, 2 Rob. (Va.) 475; Amory *v.* Reilly, 9 Ind. 490.

purchaser is bound to take notice of all liens shown to exist by his vendor's title-deed.[1] So, if the original vendor remain in open possession, especially if the purchaser shall have heard of an agreement existing in relation to the land be-
[*506] tween his vendor * and the occupant;[2] and generally any notice will be sufficient which ought to put the purchaser, as a reasonable man, upon inquiry.[3] As where vendor retained possession, his lien prevailed against the vendee of his vendee.[4] Thus, if the purchaser knows that a part of the purchase-money is unpaid,[5] or it is so recited in his deed, it is notice to the extent of the sum so recited.[6] Notice to an agent or the party's solicitor is notice to the party,[7] and a mere volunteer who pays nothing for his deed cannot set up want of notice against the claim of his grantor's vendor.[8]

12. Upon the principle above stated, the lien of a vendor takes precedence of the claim for dower of the widow of a purchaser.[9]

13. But upon the question, how far it shall prevail against creditors of the purchaser, there have been various opinions. As a general proposition, it does not prevail against such creditors,[10] though, against a voluntary assignment made by the purchaser in favor of his creditors, it will, if the vendor

1 McRimmon *v.* Martin, 14 Tex. 318; Tiernan *v.* Thurmun, 14 B. Mon. 277, Honore *v.* Bakewell, 6 B. Mon. 67; Daughaday *v.* Paine, 6 Minn. 452.

2 Hopkins *v.* Garrard, 6 B. Mon. 66; Hamilton *v.* Fowlkes, 16 Ark. 340.

3 Briscoe *v.* Bronaugh, 1 Tex. 326; Frail *v.* Ellis, 17 Eng. L. & Eq. 457.

4 Pell *v.* McElroy, 36 Cal. 268.

5 Manly *v.* Slason, 21 Vt. 271; Baum *v.* Grigsby, 21 Cal. 176.

6 Thornton *v.* Knox, 6 B. Mon. 74; Woodward *v.* Woodward, 7 B. Mon. 116; Kilpatrick *v.* Kilpatrick, 23 Miss. 124; McAlpine *v.* Burnett, 23 Tex. 649; Melross *v.* Scott, 18 Ind. 250.

7 Mounce *v.* Byars, 11 Ga. 180; Frail *v.* Ellis, 17 Eng. L. & Eq. 457.

8 Burlingame *v.* Robbins, 21 Barb. 327; Upshaw *v.* Hargrove, 6 S. & M. 286.

9 Fisher *v.* Johnson, 5 Ind. 492; Crane *v.* Palmer, 8 Blackf. 120; Williams *v.* Wood, 1 Humph. 408; Besland *v.* Hewett, 11 S. & M. 164; Nazareth, &c. *v.* Lowe, 1 B. Mon. 257; Ellicott *v.* Welch, 2 Bland, 242; Warner *v.* Van Alstyne, 3 Paige, Ch. 513; Wilson *v.* Davisson, 2 Rob. (Va.) 384; Patton *v.* Stewart, 19 Ind. 233.

10 Bayley *v.* Greenleaf, 7 Wheat. 46; Aldridge *v.* Dunn, 7 Blackf. 249; Taylor *v.* Baldwin, 10 Barb. 626; Webb *v.* Robinson, 14 Ga. 216; Gann *v.* Chester, 5 Yerg. 205; Roberts *v.* Rose, 2 Humph. 145.

file his bill in equity to enforce it before the trust is executed, especially if the assignment be in favor of antecedent creditors ;[1] and *bona fide* creditors, without notice, are considered as having equities superior to that of a vendor.[2]

14. A vendor's lien does not prevail against a *bona fide* purchaser or mortgagee without notice, the mortgagee being, in equity, regarded in the light of a purchaser.[3] If he knows of the lien when he purchases, he takes the land subject to the same. If before knowing of it he pay a part of the consideration to his vendor, he would be holden for whatever balance is due at the time of such notice.[4] If, therefore, one take a mortgage *bona fide* from another who is in possession of the estate by an absolute deed, he will hold it, though the mortgagor were in fact merely a trustee of the land without any other interest in it.[5]

* 15. This lien of a vendor for his purchase-money [*507] is purely a matter of equity and does not prevail at law.[6] And even in equity it prevails on the ground that the vendor is remediless in a court of law,[7] though it is not always necessary that the vendor should resort to proceedings at law before resorting to his bill in equity for relief.[8] But in applying the principle, the vendor cannot throw upon any one part of the estate more than a *pro rata* burden. As where the vendee sells to several different parties who are cognizant of the lien, they are ratably chargeable. So if he sell several parcels to different purchasers cognizant of the

[1] Brown *v.* Vaulier, 7 Humph. 239; Shirley *v.* Congress Sugar Refinery, 2 Edw. Ch. 505; Repp *v.* Repp, 12 Gill & J. 341.

[2] See language of Marshall, C. J., Bayley *v.* Greenleaf, 7 Wheat. 46.

[3] Bayley *v.* Greenleaf, 7 Wheat. 46 ; Clark *v.* Hunt, 3 J. J. Marsh. 553; Duval *v.* Bibb, 4 Hen. & M. 113; Wood *v.* Bank of Kentucky, 5 Mon. 194; Cole *v.* Scott, 2 Wash. 141; Kauffelt *v.* Bower, 7 S. & R. 64; Putnam *v.* Dobbins, 38 Ill. 394, 400; McLaurie *v.* Thomas, 39 Ill. 294; Blight *v.* Banks, 6 Mon. 198.

[4] Parker *v.* Foy, 43 Miss. 260.

[5] Newton *v.* McLean, 41 Barb. 285.

[6] Coote, Mortg. 218; Cator *v.* Pembroke, 1 Bro. C. C. 302, Perkins' note ; Kauffelt *v.* Bower, 7 S. & R. 64; Porter *v.* Dubuque, 20 Iowa, 440; Boynton *v.* Champlin, 42 Ill. 57–64.

[7] Pratt *v.* Vanwyck, 6 Gill & J. 495; Eyler *v.* Crabbs, 2 Md. 137; Bottorf *v.* Conner, 1 Blackf. 287 ; Roper *v.* McCook, 7 Ala. 318.

[8] Richardson *v.* Baker, 5 J. J. Marsh. 323; Green *v.* Fowler, 11 Gill & J. 103; High *v.* Batte, 10 Yerg. 186; Payne *v.* Harrell, 40 Miss. 498.

lien, and then sells the remainder to a third party, to whom the vendor releases his lien, with a knowledge of such prior sales, he releases these prior vendees a ratable proportion of his lien upon their lots. So if the vendee sell a portion of the land purchased by him to one who knows of the lien, and receives pay for the same, the original vendor must exhaust the remaining part of the estate left in his vendee's hands before he can resort to the parcel he had thus sold.[1] A similar principle was applied in case of a judgment lien, where the judgment debtor conveyed a part of his estate to a third party.[2]

16. But this lien will be defeated if the vendor do any act manifesting an intention not to rely upon the land for security.[3] What act is to be deemed to work a waiver of a vendor's lien, it may not be easy to define. But it has been held that the taking the vendee's note or bond for the purchase-money is not such an act,[4] nor his check which is not presented or paid,[5] nor a renewal of the vendee's note.[6] It can only be waived by taking collateral security, or by an express agreement to that effect.[7] But the acceptance of a distinct and separate security for the purchase-money is a waiver, as for instance a mortgage of other property,[8] or a bond or note

[1] McLaurie *v.* Thomas, 39 Ill. 294; Blight *v.* Banks, 6 Mon. 192, 198.

[2] Lowry *v.* McKinney, 68 Penn. St. 294.

[3] Walker, Am. Law, 315; Blackburn *v.* Gregson, 1 Bro. Ch. 424, and Perkins' note; 2 Crabb, Real Prop. 853; Coote, Mortg. 219; Selby *v.* Stanley, 4 Minn. 65; Daughaday *v.* Paine, 6 Minn. 450.

[4] Evans *v.* Goodlet, 1 Blackf. 246; Taylor *v.* Hunter, 5 Humph. 569; Cox *v.* Fenwick, 3 Bibb, 183; Garson *v.* Green, 1 Johns. Ch. 308; White *v.* Williams, 1 Paige, Ch. 502; Clark *v.* Hunt, 3 J. J. Marsh. 553; Thornton *v.* Knox, 6 B. Mon. 74; Aldridge *v.* Dunn, 7 Blackf. 249; Ross *v.* Whitson, 6 Yerg. 50; Tompkins *v.* Mitchell, 2 Rand. 428; Pinchain *v.* Collard, 13 Texas, 333; Truebody *v.* Jacobson, 2 Cal. 269; Walker *v.* Sedgwick, 8 Cal. 398, 493. Nor is suing it, Nairn *v.* Prowse, 6 Ves. Jr. 752, n.; Boynton *v.* Champlin, 42 Ill. 64.

[5] Honore *v.* Bakewell, 6 B. Mon. 67. And this extends to any instrument which involves merely the personal liability of the vendee. Mims *v.* Macon & Western Railroad Co., 3 Ga. 333.

[6] Mims *v.* Lockett, 23 Ga. 237. See also upon this point Winter *v.* Anson, 3 Russ. 488; Teed *v.* Carruthers, 2 Younge & C. Ch. 31; Loaring, *Ex parte*, 2 Rose, 79; Hughes *v.* Kearney, 1 Sch. & L. 136.

[7] Dubois *v.* Hull, 43 Barb. 29; McLaurie *v.* Thomas, 39 Ill. 294.

[8] Richardson *v.* Ridgely, 8 Gill & J. 87; White *v.* Dougherty, 1 Mart. & Y. (Tenn.) 309; Young *v.* Wood, 11 B. Mon. 123; 3 Sugd. Vend. 191, 204; Manly

with a surety,[1] or indorser,[2] or a deposit of stock.[3] So where vendee took notes for the purchase-money, and sold these, and the purchaser took new notes from the maker ;[4] and the taking of the note of a third party for the purchase-money is a waiver of the lien, although it be the note of the husband where the wife is the purchaser,[5] provided in
* these cases the presumption of a waiver is not re- [*508]
butted by satisfactory evidence that it was intended that the vendor should retain his lien.[6] At all events, it is *prima facie* evidence of a waiver, and the *onus* is on the vendor to prove by the most cogent and irresistible circumstances that it ought not to have that effect.[7] Although the Chancellor, in one case, was inclined to hold that the burden of proof was upon the purchaser to show that the vendor agreed to rest on the collateral security.[8] But if the vendor has merely given a bond for a deed, the lien he has for the purchase-money is treated as a mortgage, and no change in the form of the debt will discharge the lien, short of the payment of it.[9] So a vendor's lien may be shown to be waived by proof of his intention not to rely upon it as security.[10]

17. This lien does not arise in favor of a third party who pays the purchase-money to the vendor for the purchaser, and

v. Slason, 21 Vt. 277; unless vendee is guilty of fraud. Tobey *v.* McAllister, 9 Wis. 463; Mattix *v.* Weand, 19 Ind. 151; Hummer *v.* Schott, 21 Md. 311; Hadley *v.* Pickett, 25 Ind. 452, though covering only a part of the premises sold.

[1] Boon *v.* Murphy, 6 Blackf. 272; Williams *v.* Roberts, 5 Ohio, 35; Mayham *v.* Coombs, 14 Ohio, 428; Wilson *v.* Graham, 5 Munf. 297; Blight *v.* Banks, 6 Mon. 199; McGonigal *v.* Plummer, 30 Md. 422; Fonda *v.* Jones, 42 Miss. 792, unless express agreement to the contrary.

[2] Foster *v.* Trustees, 3 Ala. 302; Burke *v.* Gray, 6 How. (Miss.) 527; Marshall *v.* Christmas, 3 Humph. 616; Conover *v.* Warren, 1 Gilm. 498; Gilman *v.* Brown, 1 Mason, 191, s. c. 4 Wheat. 255; Burger *v.* Potter, 32 Ill. 66.

[3] Lagow *v.* Badollet, 1 Blackf. 416. [4] Phelps *v.* Conover, 25 Ill. 314.

[5] Cowl *v.* Varnum, 37 Ill. 181; Richards *v.* Leaming, 27 Ill. 137; Boynton *v.* Champlin, 42 Ill. 65.

[6] Campbell *v.* Baldwin, 2 Humph. 248; Mims *v.* Macon & Western Railroad, 3 Ga. 333; Baum *v.* Grigsby, 21 Cal. 175.

[7] Gilman *v.* Brown, 1 Mason, 217, 219.

[8] Hughes *v.* Kearney, 1 Sch. & L. 135.

[9] Graham *v.* McCampbell, Meigs, 53; Anthony *v.* Smith, 9 Humph. 508.

[10] Clark *v.* Hunt, 3 J. J. Marsh. 553; Phillips *v.* Saunderson, 1 S. & M. 462; Redford *v.* Gibson, 12 Leigh, 332; Mackreth *v.* Symmons, 15 Ves. 342; Austen *v.* Halsey, 6 Ves. Jr. 483.

takes his note for the same.[1] But in Ohio, where a husband and wife were sued by a vendor for the purchase of an estate conveyed to the wife, and he paid the judgment, it was held that he thereby became subrogated to the vendor's lien till repaid the sum he had been obliged to pay.[2] Nor is the rule uniform how far the assignee of a vendor's claim for the purchase-money may avail himself of his lien by way of security for the same.

18. As a general proposition, if a debt is secured by an express lien upon property by agreement of the parties, an assignment of the debt secured by such lien will give the assignee the benefit of such lien.[3] In analogy with this, it has been held in Kentucky, Indiana, and Alabama, that the assignment of a vendor's claim for purchase-money carries with it the vendor's lien, whether express or implied.[4] But the prevailing opinion in other States seems to be that such a lien is a personal one, and does not pass by assignment of the claim.[5] This is so in Mississippi, where the vendor sells his note taken for the purchase-money, unless a lien for the purchase-money is expressly reserved in the vendor's deed of the estate.[6] *

* Note. — From the numerous cases already cited from the United States and State courts, it may be unnecessary to restate in which of these this doc-

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[1] Stansell *v.* Roberts, 13 Ohio, 148; Skaggs *v.* Nelson, 25 Miss. 88; Crane *v.* Caldwell, 14 Ill. 468; Notte's Appeal, 45 Penn. St. 361.

[2] Westerman *v.* Westerman, 18 Am. Law Reg. 690.

[3] Graham *v.* McCampbell, Meigs, Tenn. 52; Tanner *v.* Hicks, 4 S. & M. 294; Norvell *v.* Johnson, 5 Humph. 489; Eskridge *v.* M'Clure, 2 Yerg. 84; Crow *v.* Vance, 4 Iowa, 430.

[4] Edwards *v.* Bohannon, 2 Dana, 98; Honore *v.* Bakewell, 6 B. Mon. 67; Lagow *v.* Badollet, 1 Blackf. 417; Brumfield *v.* Palmer, 7 Blackf. 227; Roper *v.* McCook, 7 Ala. 318; White *v.* Stover, 10 Ala. 441; Griggsby *v.* Hair, 25 Ala. 327; Fisher *v.* Johnson, 5 Ind. 492.

[5] Brush *v.* Kinsley, 14 Ohio, 20; Horton *v.* Horner, Ohio, 437; Gann *v.* Chester, 5 Yerg. 205; Sheratz *v.* Nicodemus, 7 Yerg. 9; Green *v.* Crockett, 2 Dev. & Bat. Eq. 390; Webb *v.* Robinson, 14 Ga. 216; White *v.* Williams, 1 Paige, Ch. 502; Dickenson *v.* Chase, 1 Morris (Iowa), 492; Briggs *v.* Hill, 6 How. (Miss.) 362; Moreton *v.* Harrison, 1 Bland, 491; Hallock *v.* Smith, 3 Barb. 267; Shall *v.* Biscoe, 18 Ark. 142, where the point is fully examined. Walker *v.* Williams, 30 Miss. 165; Baum *v.* Grigsby, 21 Cal. 176; Wellborn *v.* Williams, 9 Ga. 89; Green *v.* Demoss, 10 Humph. 374; McLaurie *v.* Thomas, 39 Ill. 294.

[6] Stratton *v.* Gold, 40 Miss. 780.

*19. Corresponding to the lien which a vendor has [*509] for his purchase-money is the lien which equity gives the vendee on the land to the amount advanced towards the purchase-money, until the vendor shall have made a title to the same.[1] This is but little more than carrying out the old idea of a use raised in favor of a vendee who has paid the purchase-money of an estate. And where the contract is executory, as fast as the purchase-money is paid in, it is a part performance of such contract, and to that extent the payment of the money, in equity, transfers to the purchaser the ownership of a corresponding portion of the estate. Accordingly, if the vendor, after the contract of sale made, mortgage the estate, the mortgagee takes only the interest of the vendor

trine of a vendor's lien prevails. But, for convenience, the reader will find in this note a list of the States in which such a lien is recognized as valid. New York, Stafford *v.* Van Rensselaer, 9 Cow. 316. New Jersey, Vandoren *v.* Todd, 2 Green, Ch. 397. Maryland, Carr *v.* Hobbs, 11 Md. 285. Mississippi, Trotter *v.* Erwin, 27 Miss. 772; Code, 1871, p. 501, § 2296. Missouri, Marsh *v.* Turner, 4 Mo. 253. Alabama, Burns *v.* Taylor, 23 Ala. 255. Arkansas, English *v.* Russell, Hempstead (Ark.) 35. California, Truebody *v.* Jacobson, 2 Cal. 269. Georgia, Mounce *v.* Byars, 16 Ga. 469. Florida, Woods *v.* Bailey, 3 Flor. 41. Illinois, Trustees *v.* Wright, 11 Ill. 603. Indiana, McCarty *v.* Pruet, 4 Ind. 46. Iowa, Pierson *v.* David, 1 Iowa, 23. Kentucky, Muir *v.* Cross, 10 B. Mon. 277. Michigan, Sears *v.* Smith, 2 Mich. 243. Tennessee, Brown *v.* Vanlier, 7 Humph. 239. Texas, Pinchain *v.* Collard, 13 Tex. 333. Virginia, Kyles *v.* Tait, 6 Gratt. 44. Vermont, Manly *v.* Slason, 21 Vt. 271. But to have effect it must be expressly reserved, Code, 510. Ohio, Williams *v.* Roberts, 5 Ohio, 35. And in the courts of the United States, Gilman *v.* Brown, 1 Mason, 191, s. c. 4 Wheat. 254; Bayley *v.* Greenleaf, 7 Wheat. 46; Chilton *v.* Braiden, 2 Black, 458. In Pennsylvania, North and South Carolina, the doctrine has been exploded. Zentmyer *v.* Mittower, 5 Penn. St. 403; Cameron *v.* Mason, 7 Ired. Eq. 180; Wragg *v.* Comptroller-General, 2 Desauss. 509. In Vermont, it has been abolished by statute, 1851, p. 42. In Connecticut, Delaware, and Massachusetts, the question is in doubt. Atwood *v.* Vincent, 17 Conn. 574. But see Watson *v.* Wells, 5 Conn. 468; Budd *v.* Busti, 1 Harring. 69; Wright *v.* Dame, 5 Met. 503; also Gilman *v.* Brown, 1 Mason, 191, denying such lien. It is denied in Maine. Philbrook *v.* Delano, 29 Me. 410. And in Kansas. Simpson *v.* Mundee, 3 Kansas, 172.

[1] Coote, Mortg. 218; Burgess *v.* Wheate, 1 W. Bl. 150. The doctrine is doubted by Sugden, 1 Sugd. Vend. 478, but approved in Mackreth *v.* Symmons, 15 Ves. 352, and in Story, Eq. Jur. § 1217, and note. See also Payne *v.* Attlebury, Harring. Ch. 414; Ætna Ins. Co. *v.* Tyler, 16 Wend. 385; Lowell *v.* Middlesex Ins. Co., 8 Cush. 127; Shirley *v.* Shirley, 7 Blackf. 452; Chase *v.* Peck, 21 N. Y. 585; Hope *v.* Stone, 10 Minn. 151; Taft *v.* Kessel, 16 Wis. 273, 279; Wickman *v.* Robinson, 14 Wis. 493.

under such contract. He may notify the vendee to pay him the instalment falling due. If he do not, and vendee pays it to the vendor, the effect is to divest so much of the mortgagee's equitable interest in the land.[1]

20. The mode of enforcing such liens is by a bill in equity, to have a satisfaction of the debt made; and to that end the court may order enough of the land to be sold to satisfy the lien.[2] But it can be enforced only in a suit or proceeding brought for the purpose. It cannot be reached by a collateral proceeding.[3] But the holder of such lien may be pursuing his remedy to collect his debt, and to enforce his lien at the same time, in which respect his rights are the same as of all mortgagees.[4] But it was held, that, where a vendor enforced his lien for a part of the purchase-money which was due, it exhausted his lien even as to the part not due.[5] And if the lien is once waived, equity will not revive it.[6]

[1] Rose *v.* Watson, 10 H. L. Cas. 678. See Knox *v.* Gye, L. R. 5 E. & I. App. 675, as to how far vendor, after sale, becomes a trustee of the vendee.

[2] Wilson *v.* Davisson, 2 Rob. (Va.) 384; Mullikin *v.* Mullikin, 1 Bland, 538; Eskridge *v.* M'Clure, 2 Yerg. 84; Clark *v.* Bell, 2 B. Mon. 1; Williams *v.* Young, 17 Cal. 406.

[3] Converse *v.* Blumrick, 14 Mich. 124.

[4] Payne *v.* Harrell, 40 Miss. 498; Clark *v.* Hunt, 3 J. J. Marsh. 558; Jones *v.* Conde, 6 Johns. Ch. 77; Ely *v.* Ely, 6 Gray, 439; *post*, *592, pl. 6.

[5] Codwise *v.* Taylor, 4 Sneed, 346. [6] Burger *v.* Potter, 32 Ill. 66.

* SECTION IV. [*510]

OF THE MORTGAGEE'S INTEREST.

1. Of the divisions of the subject.
2. Mortgagee's estate at common law.
3. Of his estate in equity.
4. Of his interest before condition broken.
5. Two opposite sets of rules relative to his estate.
6. How these rules arose.
7. How these rules apply in the several States.
7 *a*. Mortgages, how classified.
7 *b*. Interests of mortgagor and mortgagee.
8. How far a mortgagee holds his interest as real estate.
9. How far his right to possession is restricted.
10. Mortgagor's and mortgagee's rights go to assignees.
11. How a mortgagee may assign his interest.
12, 13. How far it may, and how far it must be, by deed.
14. How far it may be by transfer of the debt.
15, 16. Of enforcing mortgagee's rights as to a legal estate.
17. When the holder of legal estate trustee for the holder of the debt.
18. Where transfer of debt passes seisin of the estate.
19. The rights of holders unaffected by forms of assignment.
20. Assignment, how far governed by the place.
21. Forms of remedy in favor of assignees.
22. What will divest the mortgagee of his seisin.
23. Of enforcing mortgages on different parcels *pro rata*.
24, 25. When payment operates as a discharge or assignment.
26–28. When waste lies by the mortgagee.
29. Of leases of mortgaged premises.
30, 31. Of the recovery of rent by the mortgagee.
32. Mortgagee's interest not subject to dower or debts.
33. Of devises affecting mortgages.
34. Mortgages go to the personal representatives.
35. Of mortgages for separate debts.
36. Of separate mortgages for one debt.
37, 38. Of the order in which mortgages take effect.
39. Of the recording of assignments.
40. Of judgment and mortgage liens.
41. Of the tacking of mortgages.
42. Of mortgages for future advances.
42 *a*. How far subsequent may have precedence of prior advances.
43, 44. Of property added to mortgaged estates.
45. Of waiving foreclosure.
46. Of different stages of the mortgagee's interest.

1. HAVING considered the form and manner of constituting a mortgage, it becomes proper, in the next place, to consider

the interest or estate thereby created in the mortgagee, and what interest or estate remains in the mortgagor. So far as this respects mortgagees, it would be a hopeless task to attempt to reconcile the language and views of different courts and writers upon the subject. Indeed, the positive enactments of the several States upon the nature of a mortgagee's rights and interest are not uniform. In order to simplify the matter as far as may be, it is proposed to treat (1) of a mortgagee's interest by the rules of the common law; (2) by the rule of equity; (3) the respects in which these are varied or controlled by the local laws of the several States.

2. (1) By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs.[1] He takes it subject to its being defeated by the grantor's doing some act, such as the payment of money, in a prescribed time and manner, and often subject to the right of the grantor to occupy till he fails to perform the condition of his deed. But if the condition fail to be fulfilled punctually, all right of the grantor to the estate is thereafter gone, and the mortgagee becomes the absolute and unconditional owner of the entire estate.[2] Indeed, the idea of an estate in the right in equity to redeem mortgaged lands being in the mortgagor is of comparatively a recent origin. Lord Hardwicke, about 1736, first [*511] declared it to be such until * barred by foreclosure. And although at first this was purely a notion of equity, it has, as will be shown hereafter, found its way into the common law to a greater or less extent, according as it was more or less favored by the courts of the several States.[3]

3. (2) In equity, the interest of a mortgagee is essentially different from that at common law. It has two aspects, one before and the other after the condition of the mortgage has

[1] Van Dyne *v.* Thayre, 14 Wend. 236; Deemarest *v.* Wynkoop, 3 Johns. Ch. 145; 2 Crabb, Real Prop. 858; Wms. Real Prop. 349; 1 Byth, by Jarman, Conv. 638; Fisk *v.* Fisk, Prec. Chan. 11; Co. Lit. 205 a, n. 96. But see, as to mortgages being devisory before condition broken, 2 Crabb, Real Prop. 882.

[2] Wms. Real Prop. 351, 352, 354; 2 Crabb, Real Prop. 856, 857.

[3] Casborne *v.* Scarfe, 1 Atk. 603; Story, Eq. Jur. § 1015; Parsons *v.* Welles, 17 Mass. 419; Co. Lit. 205 a, Butler's note, 96.

been broken, and sometimes a third, where this breach has been followed by actual possession taken of the premises by the mortgagee. Besides, recourse is often necessary to be had to the forms of law, in order to enforce a mortgagee's rights. Here a different set of terms is made use of in relation to his interest from those used in considering it in equity. In one connection it may be spoken of as a personal interest, in the other as a legal estate. This may aid in partially reconciling the discrepancy in the manner in which courts have treated mortgages, though it may not fully explain it. Thus a mortgagee can only release his interest in the land by a deed. But equity will enforce it if made by writing not under seal.[1] And if a writ of entry be brought against one in possession of land, who holds a mortgage upon the same, he may plead that he is seised in fee, although he may never have made formal entry to foreclose the same.[2]

4. As a general proposition, equity regards a mortgage, especially before the condition is broken, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself. It treats the debt as the principal thing, and the land as a mere incident to it. Whatever it does with the land is auxiliary to enforcing payment of the debt.[3]

5. Hence arise two sets of rules in respect to the rights and interest of every mortgagee in England and in this country, * except in those States where the one [*512] or the other is superseded or modified by legislation or local law. And the confusion, if confusion it is, that may have arisen in administering these two systems, may be

[1] Headley *v.* Goundray, 41 Barb. 282. [2] Hoxie *v.* Finney, 11 Gray, 511.

[3] Martin *v.* Mowlin, 2 Bur. 978; Matthews *v.* Wallwyn, 4 Ves. 118; Co. Lit. 205, Butler's note, 96; Wms. Real Prop. 349; Id. 354; Brown *v.* Gibbs, Prec. Chanc. 97; Miami Ex. Co. *v.* United States Bank, Wright (Ohio), 249; Hughes *v.* Edwards, 9 Wheat. 500; Runyan *v.* Mersereau, 11 Johns. 534; Myers *v.* White, 1 Rawle, 353; Ellison *v.* Daniels, 11 N. H. 280; Ragland *v.* Justices, 10 Ga. 65; Dougherty *v.* McColgan, 6 Gill & J. 275; Dudley *v.* Cadwell, 19 Conn. 218; Calkins *v.* Calkins, 3 Barb. 305; Waring *v.* Smyth, 2 Barb. Ch. 119; Kinna *v.* Smith, 2 Green, Ch. 14; Jackson *v.* Willard, 4 Johns. 41; Whitney *v.* French, 25 Vt. 663; Hannah *v.* Carrington, 18 Ark. 85; McMillan *v.* Richards, 9 Cal. 365; Anderson *v.* Baumgartner, 27 Mo. 80; Green *v.* Hart, 1 Johns. 580; Eaton *v.* Whiting, 3 Pick. 484.

ascribed, in some cases at least, to the same court exercising both law and equity jurisdiction, as is the case in several of the States. In some of the States, as will be hereafter shown, the form of enforcing a mortgage is by process at common law, the statute working out a foreclosure by lapse of time. In others the form is by a process in equity, by a decree of foreclosure, such as is ordinarily adopted in England. In others still, the form is by a sale of the premises effected through a decree in chancery. Besides this, in several of the States, as in England, as will appear, a mortgagee may obtain possession of the premises by a writ of entry, or process of ejectment, in which his legal rights are chiefly or alone regarded. But complex as this must necessarily render the system, it is apprehended that the principal discrepancy between the courts of different States and the courts of the same State, at times, has arisen from undertaking to give effect in courts of law, under proceedings at common law, to assignments and transfers by mortgagees which are recognized as good in equity, though directly at variance with the rules of law. Among the illustrations which the cases afford of this discrepancy, it is held in New Hampshire and in New York that a mere transfer of the debt secured would pass the interest of the mortgagee in the land.[1] Whereas, in Massachusetts and Maine, the opposite opinion is maintained by the courts.[2] In Pennsylvania, in one case, the court were inclined to carry this doctrine of personalty, as applied to a mortgage, so far as to hold that an assignment of a mortgage was not within their registry act.[3] But in a subsequent case the court held the reverse, on the ground that the [*513] assignment of a mortgage "was a formal * convey-

[1] Smith *v.* Moore, 11 N. H. 55; Southerin *v.* Mendum, 5 N. H. 420; Green *v.* Hart, 1 Johns. 580. So in Texas, South Carolina, and Tennessee. Perkins *v.* Sterne, 23 Tex. 563; Wright *v.* Eaves, 10 Rich. Eq. 585; Cleveland *v.* Martin, 2 Head, 128; Fifield *v.* Sperry, 20 N. H. 341; Hoitt *v.* Webb, 36 N. H. 164; Hill *v.* Edwards, 11 Minn. 29; s. p. Moore *v.* Cornell, 68 Penn. St. 322.

[2] Warren *v.* Homestead, 33 Me. 256; Young *v.* Miller, 6 Gray, 152; Crane *v.* March, 4 Pick. 131. So in Ohio. Swartz *v.* Leist, 13 Ohio St. 419; Rice *v.* Dewey, 13 Gray, 50. So in Illinois. Vansant *v.* Allmon, 23 Ill. 33. And in Connecticut. Gregory *v.* Savage, 32 Conn. 250.

[3] Craft *v.* Webster, 4 Rawle, 242.

ance of the same land" which had been conveyed by the mortgage.[1] In one case in New York, the judge says: "Mortgages are not considered as conveyances of lands within the statute of frauds."[2] In another, Sutherland, J., says: "The power of a mortgagee to sell is a power to create or acquire to himself the *equitable estate* in the land during the continuance of the *legal estate* conveyed to him by the mortgage." And he speaks of it as a power *annexed to the estate*.[3] So, in one case in Pennsylvania, the court say: "The mortgagee has no estate, property, or interest in the land until he takes possession of the property."[4] In another, they say: "Why may he not recover the land in an ejectment? he has a perfect legal estate, which is all that is necessary to support that action."[5]

6. As these seeming incongruities will be constantly presenting themselves in the progress of this investigation, these instances will serve for the present. And it is believed that not a few of them may be ascribed to the unqualified adoption of certain opinions expressed by Lord Mansfield, especially the one so often quoted from the case of Martin *v.* Mowlin:[6] "A mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence. Nay, it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds."

As it should be the purpose of a work like this to state how the law has been held, rather than how it should have been

[1] Philips *v.* Bank of Lewiston, 18 Penn. St. 394.

[2] Green *v.* Hart, 1 Johns. 580.

[3] Wilson *v.* Troup, 2 Cow. 236.

[4] Myers *v.* White, 1 Rawle, 353.

[5] Smith *v.* Shuler, 12 S. & R. 241.

[6] Martin *v.* Mowlin, 2 Burr. 978, 979. See Judge Trowbridge's opinion in Hooton *v.* Grout, Quincy, 343, 353, where he expresses a doubt if the words quoted ever were uttered by Lord Mansfield; and it is said, if they were, neither of the judges concurred with him in the propositions. See also Parsons *v* Welles, 17 Mass. 424, where Wilde, J., expresses a like doubt.

held to be, it is not proposed to discuss this point fur-
[*514] ther than to cite * the opinions of high authority that bear upon it. Mr. Coventry, in a note to Powell on Mortgages,[1] says on this subject: "Lord Mansfield, indeed, appears to have entertained mistaken conceptions on this and other subjects connected with the law of mortgages. His chief error seems to have been in mixing rules of equity with rules of law, and applying the former in cases where the latter only ought to have prevailed." Wilde, J., in commenting on this passage in Lord Mansfield's decision, says: "This would confound all our notions, and break down every distinction between real and personal estate, between a title to land and a chose in action."[2]

7. It is proposed, therefore, without attempting to arrange harmoniously the parts of so complicated a system, to group together, as well as the subject admits, the rules which have been recognized or adopted in the various States as to the nature and character of a mortgagee's interest in lands held by him in mortgage. In Massachusetts, Maine, and New Hampshire, it has been repeatedly held, that as between mortgagor and mortgagee the legal freehold passes by the deed of the former to the latter; and that, unless restricted by the terms of the deed, the mortgagee may enter at once upon the premises, nor would he be liable in trespass to the mortgagor for making such entry, or exercising any ordinary acts of ownership upon the premises.[3] And in Alabama,

[1] Powell, Mortg. 267, n.

[2] Parsons *v.* Welles, 17 Mass. 424. See also Judge Trowbridge's comments on the same clause, 8 Mass. 558. The reader is also referred to the opinions expressed by Lord Redesdale and Lord Eldon, of Lord Mansfield's attempts to apply the rules of equity in some of his decisions. Shannan *v.* Bradstreet, 1 Sch. & L. 66; Wilson, *Ex parte*, 2 Ves. & B. 252. See also the language of Ch. J. Mellen in Vose *v.* Handy, 2 Greenl. 338.

[3] Groton *v.* Boxborough, 6 Mass. 50; Erskine *v.* Townsend, 2 Mass. 493; Fay *v.* Cheney, 14 Pick. 399; Fay *v.* Brewer, 3 Pick. 203; Page *v.* Robinson, 10 Cush. 99; Bradley *v.* Fuller, 23 Pick. 1; Lackey *v.* Holbrook, 11 Met. 458; Taylor *v.* Townsend, 8 Mass. 411; Reading of Judge Trowbridge, 8 Mass. 551; Maynard *v.* Hunt, 5 Pick. 240; Newall *v.* Wright, 3 Mass. 138; Winslow *v.* Merchants' Ins. Co., 4 Met. 306; Butler *v.* Page, 7 Met. 40; Miner *v.* Stevens, 1 Cush 485; Wales *v.* Mellen, 1 Gray, 512; Blaney *v.* Bearce, 2 Greenl. 132; Frothingham *v.* McKusick, 24 Me. 403; Covell *v.* Dolloff, 31 Me. 104; Foster *v.* Perkins, 42 Me. 168; Furbush *v.* Goodwin, 9 Fost. (N. H.) 321; Chellis *v.* Stearns, 2 Fost. (N. H.)

"after the law-day of the mortgage, the legal estate is absolutely vested in the mortgagee; the mortgagor has nothing left but an equity of redemption.[1] But in New Hampshire, the progress of opinion in her courts has at last brought them to the conclusion that "mortgagees have only a security, and not a vested estate." For certain purposes the mortgagee is treated as the owner of the land mortgaged, but it is only for the purposes of protecting the interest of the mortgagee in the land. Before entry to foreclose, it is a mere chattel, a security for the debt, and passes with the debt.[2] And the seisin acquired by a mortgagee under * such a deed [*515] is sufficient to carry with it, according to the right he has in the estate, the benefit of the covenant of warranty made to his mortgagor.[3] And in some cases, moreover, the mortgagee may have trespass against the mortgagor, even before condition broken, as for resisting his entry, or cutting timber, and the like.[4] But not for occupying the estate in a husbandlike manner, or for cutting wood and timber suitable for use and repairs on the premises, nor unless he does acts to injure the inheritance.[5] So the mortgagee may have an action at law to eject the mortgagor without even giving notice to quit, unless restrained by the terms of the deed, as has been held in England.[6] So he may have a writ of entry

312; Ewer *v.* Hobbs, 5 Met. 3; Welch *v.* Priest, 8 Allen, 165; Howard *v.* Robinson, 5 Cush. 123. But see Great Falls Co. *v.* Worster, 15 N. H. 412.

[1] Barker *v.* Bell, 37 Ala. 358. [2] Northy *v.* Northy, 45 N. H. 144.

[3] White *v.* Whitney, 3 Met. 81; McGoodwin *v.* Stephenson, 11 B. Mon. 21; Felch *v.* Taylor, 13 Pick. 133; Dwin *v.* Henderhote, 32 Iowa, 192.

[4] Smith *v.* Johns, 3 Gray, 517; Page *v.* Robinson, 10 Cush. 99; Furbush *v.* Goodwin, 9 Fost. (N. H.) 321; Northampton Mills *v.* Ames, 8 Met. 1; Newall *v.* Wright, 3 Mass. 138; Clark *v.* Beach, 9 Conn. 151.

[5] Hapgood *v.* Blood, 11 Gray, 402; Smith *v.* Moore, 11 N. H. 62.

[6] Coote, Mortg. 342; Id. 374; Birch *v.* Wright, 1 T. R. 378; Cholmondely *v.* Clinton, 2 Meriv. 359; Doe *v.* Giles, 5 Bing. 421; Keech *v.* Hall, Doug. 21. In New Hampshire, Smith *v.* Moore, 11 N. H. 55; Pettingill *v.* Evans, 5 N. H. 54; Furbush *v.* Goodwin, 9 Fost. (N. H.) 321; Hobart *v.* Sanborn, 13 N. H. 226; a writ of entry before condition broken, Tripe *v.* Marcy, 39 N. H. 439. In Mississippi, Trustees *v.* Dickson, 1 Freem. Ch. 474. In Vermont, after condition broken, Tucker *v.* Keeler, 4 Vt. 161; Morey *v.* McGuire, 4 Vt. 327; Wilson *v.* Hooper, 13 Vt. 653. In Maine, Blaney *v.* Bearce, 2 Greenl. 132; Smith *v.* Kelley, 27 Me. 237. In Massachusetts, Mayo *v.* Fletcher, 14 Pick. 525; Howe *v.* Lewis, Id. 329. In Pennsylvania, Smith *v.* Shuler, 12 S. & R. 240; Knaub *v.*

against any one in possession claiming seisin adversely to him; and this would include the mortgagor himself if in possession, although he may have conveyed away his entire title to a stranger.[1] In Vermont, it is said, "it is the mortgagor's right at law to hold possession till condition broken. And *in equity*, till foreclosure and the time of redemption has expired."[2] But at common law a mortgagor in possession could not be deemed so far a trespasser as to be liable for rents and profits received while in occupation of the premises.[3] And upon recovery in such action he will take the estate with all crops growing upon it.[4] Nor will equity interfere to prevent a mortgagee from pursuing his legal remedy to obtain possession of the premises, or from assuming possession at any time, if not restrained by his deed or some statute.[5] And yet, by a singular want of exactness in expression, the courts of Pennsylvania, in some of the cases, represent the interest of a mortgagee as not being an estate or interest in land, though in form a conveyance of land, but in [*516] substance a security * for the payment of money, and as a chose in action.[6] In Georgia, a mortgage does not divest the mortgagor of the legal estate until foreclosure and sale. It is but an incumbrance, a security with a lien.[7] Also in New York the court say: "It conveys no title to the property. The interest of the mortgagee is a mere chattel

Esseck, 2 Watts, 282; M'Call *v.* Lenox, 9 S. & R. 302; Simpson *v.* Ammons, 1 Binn. 176. In Connecticut, Clark *v.* Beach, 6 Conn. 142. In Ohio, after condition broken, Doe *v.* Pendleton, 15 Ohio, 735; Frische *v.* Cramer, 16 Ohio, 125. In Maryland, Evans *v.* Merriken, 8 Gill & J. 39; M'Elderry *v.* Smith, 1 Har. & J. 72. In Mississippi, Watson *v.* Dickens, 12 S. & M. 608; Hill *v.* Robertson, 24 Miss. 368. In Arkansas, Kannady *v.* McCarron, 18 Ark. 166. The cases from Pennsylvania, Maryland, Mississippi, and Arkansas, like those from Vermont and Ohio, were where the condition had been broken. He can have no action at law in California. Lord *v.* Morris, 18 Cal. 487.

[1] Johnson *v.* Phillips, 13 Gray, 198.

[2] Per Barrett, Ch., Cheever *v.* Rutland & B. Railroad, 39 Vt. 653.

[3] Syracuse City Bank *v.* Tallman, 31 Barb. 200; Wilder *v.* Houghton, 1 Pick. 39.

[4] M'Call *v.* Lenox, 9 S. & R. 302. [5] Den *v.* Wright, 2 Halst. 175.

[6] Myers *v.* White, 1 Rawle, 353; Rickert *v.* Madeira, Id. 325; Asay *v.* Hoover, 5 Bibb, 35; Wilson *v.* Shoenberger, 31 Penn. St. 295; Guthrie *v.* Kahle, 46 Penn. St. 333; Lennig's estate, 52 Penn. St. 138; Horstman *v.* Gerken, 49 Penn. 287.

[7] Ragland *v.* The Justices, &c., 10 Ga. 65.

interest;" "a specific lien only on the estate mortgaged."[1] But though a lien only, it may ripen by foreclosure to a title, extinguishing that of the mortgagor.[2] The same is the law of Ohio,[3] Michigan,[4] and Iowa.[5] But the courts of Iowa hold mortgages as coming within the meaning of "conveyances" of land.[6] In Michigan, the mortgagor, until foreclosure, is in possession by right, and not sufferance. The mortgagee can have no possessory action against him, and the mortgagor may make the same arrangements as any owner in respect to the management of the estate. The mortgage creates no title, but only a specific lien.[7] In South Carolina, the mortgagee is by statute to be deemed the owner only of the money or debt secured by the mortgage; and it is held that a mortgage does not convey a fee, and that a mortgagor cannot be ejected even after a breach of condition. The same is the rule in Georgia.[8] And in New York and Indiana, the right to possession by the mortgagee before condition broken is denied expressly by statute.[9] And in New York ejectment will not lie by a mortgagee.[10] The courts of California have, with commendable consistency, discarded altogether the common-law doctrine of the legal title vesting in the mortgagee.

[1] Bryan *v.* Butts, 27 Barb. 503; Kortright *v.* Cady, 21 N. Y. 343.

[2] Smith *v.* Gardner, 42 Barb. 365; Packer *v.* Rochester R. R., 17 N. Y. 287.

[3] Miami Ex. Co. *v.* United States Bank, Wright (Ohio), 251.

[4] Dougherty *v.* Randall, 3 Mich. 581; Caruthers *v.* Humphrey, 12 Mich. 278.

[5] Hall *v.* Savill, 3 Greene (Iowa), 87. But in Porter *v.* Green, 4 Iowa, 571, it was held to convey an estate, and must be recorded as such.

[6] Babcock *v.* Hoey, 11 Iowa, 377; Bank State of Indiana *v.* Anderson, 14 Iowa, 555. See the subject considered, White *v.* Rittenmyer, 30 Iowa, 268.

[7] Crippen *v.* Morrison, 13 Mich. 36; Ladue *v.* Detroit, &c. R. R., 13 Mich. 394; Newton *v.* Sly, 15 Mich. 396. And the court, in 13 Mich. 395, indulge in the following free criticism: "In some of the New England States and Kentucky, the old idea of an estate upon condition continues to rankle in the law of mortgages like a foreign substance in a living organism. But it is rapidly being eliminated and thrown off by the healthy action of the courts, under a more vigorous application of plain common sense." But we are not told which of the multitude of forms, which this protean something called a mortgage has assumed in different States, is ultimately to be the dominant one, when this idea shall have ceased to rankle.

[8] Ragland *v.* Justices, &c., 10 Ga. 65; Code, 1873, p. 339, § 1954; State *v.* Laval, 4 McCord, 336; Thayer *v.* Cramer, 1 McCord, Ch. 395.

[9] 2 N. Y. Rev. Stat. 1863, vol. 2, p. 321; Ind. Stat. 1862, vol. 2, p. 355.

[10] Stewart *v.* Hutchins, 13 Wend. 485; Murray *v.* Walker, 31 N. Y. 402.

"This theory," say the court, "is entirely changed by our system, and the legal title remains with the mortgagor, subject to be divested by foreclosure and sale.[1] The mortgagee has no right of possession except as the result of foreclosure.[2] And the same rule, in substance, prevails in Kansas. The mortgagee's right is a lien, and not an estate; and where mortgagor, after making his mortgage, erected a house upon the premises, and then sold it to a third party, who removed it, the mortgagee was held to be without remedy.[3] In Louisiana, "a mortgage is a real right, a *jus in re*," and must be recorded like a sale of the realty, and the record is the notice which persons are to regard in purchasing the estate.[4] A "mortgagee in possession" has thereby no additional rights in California. It is not a term known to the law. But he may have an injunction against the mortgagor to stay waste, or an action on the case for such an injury to the real estate as impairs the security for the debt. And even this right to stay waste by removing a building, for instance, depends upon whether it will render the estate inadequate security for the debt.[5] In Connecticut, the court, after commenting upon the interest of a mortgagee being in part a personal one, say: "It is still true, that, upon execution of the mortgage-deed, [*517] the legal title vests in the mortgagee, * subject to be defeated only on performance of the condition; and after condition broken, the estate of the mortgagor is forfeited at law, and his only remedy is in equity." But in commenting upon the modifications of the title made by equity, and borrowed by the courts of law, they say, "The title (of a mortgagee) can be no better distinguished than by calling it

[1] Bellock *v.* Rogers, 9 Cal. 123, per Burnett, J. That mortgages pass no estate in the land, McMillan *v.* Richards, 9 Cal. 365. See Dig. Laws of Cal. 1858, p. 201, art. 99; Guy *v.* Ide, 6 Cal. 99; Clark *v.* Baker, 14 Cal. 626; Fogarty *v.* Sawyer, 17 Cal. 592; Goodenow *v.* Ewer, 16 Cal. 461; Dutton *v.* Warschauer, 21 Cal. 621, 623.

[2] Grattan *v.* Wiggins, 23 Cal. 26; Daubenspeck *v.* Platt, 22 Cal. 335; Kidd *v.* Temple, 22 Cal. 262.

[3] Chick *v.* Willetts, 2 Kans. 391; Clark *v.* Reyburn, 1 Kans. 284.

[4] Carpenter *v.* Allen, 16 La. An. 437.

[5] Robinson *v.* Russell, 24 Cal. 473; Cunningham *v.* Hawkins, 24 Cal. 408; Buckout *v.* Swift, 27 Cal. 436. See also Brady *v.* Waldron, 2 Johns. Ch. 148; Story, Eq. § 915.

a *mortgage* title and *nothing more*." [1] The law of Texas on the subject is somewhat peculiar. "While," say the court, "in terms it conveys the estate with the right of taking it back upon the payment of money, its legal effect is to give a mere lien upon the land to secure this payment, with the right of foreclosure on default of the mortgagor." And in another case they say, "The breach of the condition vests the absolute right in the mortgagee, and it is only in a court of equity that the heir can assert the right to redeem." [2]

7 *a*. Although at the hazard of repetition, it seems desirable, before entering more fully upon the doctrines of the different States upon the subject of mortgages, to reduce, as far as may be, to an orderly classification, the character and qualities with which mortgages, as constituting a pledge of the realty, have been clothed, in the construction given to them by the courts and laws of these States. This will be found to embrace three pretty well-defined classes, while it is difficult to distinguish, in respect to some of the States, into which, if either, its mortgages would fall. In the first, the mortgage deed is held to create a seisin of, and an estate in, the premises, in the mortgagee, with the incidents belonging thereto at common law, such as a right of possession, to be enforced if need be by ejectment or other suit at law. Another incident to this class of mortgage interests is the right which the mortgagee has, upon failure of the mortgagor to redeem the pledge, to become himself, through some process of foreclosure, the absolute owner of the premises. This class may be said to come within the common law of mortgages. In the second class, while it is assumed that the mortgage deed creates an interest in the mortgaged premises answering to an estate in the mortgagee, his rights and remedies in respect to the same are limited to such as the rules of equity prescribe, and may not be enforced by a suit at law. In the third class are embraced those where the interest of the mortgagee in the subject-matter of the mortgage is not deemed to be an *estate*, but a mere lien, and to be enforced as such,

[1] Dudley *v.* Cadwell, 19 Conn. 218; Chamberlain *v.* Thompson, 10 Conn. 243; Rockwell *v.* Bradley, 2 Conn. 1; Wakeman *v.* Banks, Id. 445.

[2] Sampson *v.* Williamson, 6 Tex. 114; Baxter *v.* Dear, 24 Tex. 22.

through the instrumentality of a court of equity, by causing the premises to be sold as a means of payment of the debt secured. The first, it is believed, will be found to embrace those of Massachusetts, Maine, Connecticut, New Hampshire, Rhode Island, Vermont, Indiana, Missouri, North Carolina, Mississippi, and Minnesota. In the second are those of Iowa, Illinois, Pennsylvania, Kentucky, Ohio, Wisconsin, and Texas. In the third are those of California, Georgia, and New York. In Michigan, a mortgage conveys no title in the estate until foreclosure and sale. It merely creates a lien, but no right of possession prior to foreclosure.[1] In Illinois, between mortgagee and mortgagor, the mortgage is considered as security for the debt. But between the mortgagee and a stranger the former is considered as owner of the freehold, and may enter and take the profits. If in possession, he may charge for taxes paid, and for expenses incurred in preserving the estate.[2] The mortgagee, however, may sue and enforce the collection of the mortgage debt out of other than the property mortgaged.[3] The importance of this classification, if well founded, will be obvious, when it is remembered how frequently, in discussing questions growing out of mortgages, cases are cited as authorities in the court of one State, which were decided in another in which a different system prevails. A few of the many cases bearing upon the point of classification are given below, as being among those upon which it has been based.[4] There is still another division in the nature and

[1] Hogsett *v.* Ellis, 17 Mich. 363.

[2] Moore *v.* Titman, 44 Ill. 367.

[3] Karnes *v.* Lloyd, 52 Ill. 117.

[4] Erskine *v.* Townsend, 2 Mass. 495; Blaney *v.* Bearce, 2 Me. 132; Southerin *v.* Mendum, 5 N. H. 429; Carpenter *v.* Carpenter, 6 R. I. 542; Kimball *v.* Lockwood, Id. 139; Waterman *v.* Matteson, 4 R. I. 539; Goodman *v.* White, 26 Conn. 320; Wilson *v.* Hooper, 13 Vt. 653; Wright *v.* Lake, 30 Vt. 206; Givan *v.* Doe, 7 Blackf. 212; Kennett *v.* Plummer, 28 Mo. 145; Benzein *v.* Robenett, 1 Dev. Eq. 444; Gwyn *v.* Wellborn, 1 Dev. & Bat. (Law) 318; Wilkinson *v.* Flowers, 37 Miss. 585; Heyward *v.* Judd, 4 Minn. 492; Pace *v.* Chadderdon, Id. 502; Adams *v.* Corriston, 7 Minn. 462; Wilson *v.* Shoenberger, 31 Penn. St. 299; Philips *v.* Bank of Lewiston, 18 Penn. St. 402; Porter *v.* Green, 4 Iowa, 575, citing Ewer *v.* Hobbs, 5 Met. 3; McConnel *v.* Holobush, 11 Ill. 61; Perkins *v.* Sterne, 23 Tex. 563; Croft *v.* Bunster, 9 Wis. 508; Russell *v.* Ely, 2 Black. 575; Walker, Am. Law, 304; Swartz *v.* Leist, 13 Ohio St. 419; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 258; Redman *v.* Sanders, 2 Dana, 68; Syracuse City Bank *v.* Tallman, 31 Barb. 200; Stoddard *v.* Hart, 23 N. Y. 560; Kortright *v.*

character of mortgages, when regarded as securities for loans, which grows out of the difference in the extent to which courts have carried the theory, that the debt intended to be secured is the principal thing, carrying with it, as an incident, the interest in the subject-matter of the mortgage. Thus, in several of the States, it is held that a transfer of the debt operates an assignment in equity of the mortgagee's interest; and in New Hampshire the doctrine is carried so far as to hold that a transfer of the debt carries with it the legal seisin of the mortgaged estate.[1] But in Iowa, it was held that if a mortgagee were to assign a debt secured by mortgage, and should afterwards receive payment of the same and discharge the mortgage, and the mortgagor thereupon should make a new mortgage to one who was not cognizant of these facts, the second mortgagee would hold against the assignee of the debt secured by the first.[2] On the other hand, this doctrine of transferring the mortgagee's legal interest in mortgaged real estate, by a simple delivery or transfer of the evidence of the debt intended to be secured, is denied by the courts of other States. Instead of this, they generally hold that the mortgagee, if he assigns the debt but retains the mortgage, becomes a trustee for the benefit of the holder of the debt.[3] But even this classification, broad as it may seem, does not embrace every phase which mortgages are made, in some of the States named, to assume, in respect to the nature and extent of title to lands created by them, from the manner in which the rules of law and equity have been blended, and have, moreover, been modified by local legislation. Thus, in

Cady, 21 N. Y. 343; Nagle *v.* Macy, 9 Cal. 428; McMillan *v.* Richards, Id. 365; Dutton *v.* Warschauer, 21 Cal. 621; Elfe *v.* Cole, 26 Geo. 200; Gibbs *v.* Holmes, 10 Rich. Eq. 489.

[1] *Post*, p. *525; Perkins *v.* Sterne, 23 Tex. 563; Wright *v.* Eaves, 10 Rich. Eq. 585; Cleveland *v.* Martin, 2 Head, 128; Green *v.* Hart, 1 Johns. 580; Sargent *v.* Howe, 21 Ill. 149; Herring *v.* Woodhull, 29 Ill. 99; Rice *v.* Cribb, 12 Wis. 179; Johnson *v.* Carpenter, 7 Minn. 183; Burton *v.* Hintrager, 18 Iowa, 348; Vansant *v.* Almon, 23 Ill. 30; Willis *v.* Vallette, 4 Met. (Ky.) 195.

[2] Bank, &c. *v.* Anderson, 14 Iowa, 544.

[3] Young *v.* Miller, 6 Gray, 152; Swartz *v.* Leist, 13 Ohio St. 419; Johnson *v.* Carpenter, 7 Minn. 176, 184; where the doctrine of the debt conveying the estate is declared to be "inherently vicious, and would tend very much to unsettle titles."

New York, the court in one case say: "With us a mortgage is a lien or security only, and not in any sense a title."[1] And in another case, Denio, J., says: "Before the revised statutes, a mortgagee could maintain ejectment after forfeiture, but he cannot now; and now if he gets into possession he may defend himself upon the title conveyed by it."[2] And the same judge, in another case, says: "Where legal title is concerned, a mortgage, which, for many purposes, is a mere chose in action, is a conveyance of land."[3] In another case in the same court, it is said: "The mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against the mortgagee."[4] While in another case in the same State, the judge, in giving the opinion of the court, says: "After forfeiture and condition broken, the mortgagee, if he be in possession, is considered to have the legal estate, and an action of ejectment cannot be maintained against him."[5] These various dicta have their significance and consistency, by referring them to the various conditions under which the rights of parties were considered, in their connection with the titles to the respective mortgaged estates in respect to which the questions arose. A similar doctrine to that stated in New York is also adopted in Wisconsin, that though a mortgagee cannot recover of the mortgagor in ejectment, if once he is lawfully in possession, the mortgagor cannot recover back the possession from him[6] so long as the mortgage is unsatisfied.[7] In South Carolina, so long as the mortgagor retains possession of the land, the mortgagee has no remedy under his mortgage but to cause the premises to be sold after a breach of the condition. And yet if he leaves possession, though it be by aliening the title to a stranger, the mortgagee is remitted to his common-law rights, which, after condition broken, are

[1] Stoddard *v.* Hart, 23 N. Y. 560. See also Syracuse City Bank *v.* Tallman, 31 Barb. 200.

[2] Mickles *v.* Townsend, 18 N. Y. 575.

[3] Packer *v.* Rochester & Syr. R. R. Co., 17 N. Y. 287.

[4] Kortright *v.* Cady, 21 N. Y. 347, 364.

[5] Bolton *v.* Brewster, 32 Barb. 390, 395; Sahler *v.* Signer, 44 Barb. 614.

[6] Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, 6 Wis. 244. See Russell *v.* Ely, 2 Black. 579, explaining these cases.

[7] Hennesy *v.* Farrell, 20 Wis. 44.

those of the owner of the land.[1] On the other hand, in Georgia and California, there is no way in which a mortgagee can acquire a seisin or right of possession of mortgaged premises except by purchase under a judicial sale for foreclosure.[2] A mortgage in California conveys no title to the mortgaged premises. It only creates a lien.[3] Enough, however, has appeared from the above citations, without occupying more space, to show how difficult it is to lay down any general rules as to the rights and remedies of mortgagees which are not liable to be modified, in their application, by the circumstances of the particular cases as they arise, growing out of local laws and the subjects-matter to which they relate. And perhaps the language of an American writer on the subject may not seem too strong, as applied to some of the States, when he says: "The law of mortgages has in the course of time undergone so many changes, that scarcely one of the original doctrines on the subject now remains."[4]

7 *b*. Notwithstanding the space already occupied by citations designed to show the law of the several States as it bears upon the respective interests of the mortgagor and mortgagee in premises mortgaged, it seems proper to refer to a recent decision of the court of New York upon this point, as defining the last phase the law, on this point, has assumed in that State. The mortgagor alone owns any estate in the land. The mortgagee has only a chose in action, a security of a personal nature. Since the revised statutes, a mortgagee cannot maintain ejectment, either before or after condition broken. A foreclosure is the only way in which a mortgagor can be divested of his possession. A mortgagee can sell his bond and mortgage "by mere delivery as personal property." "He has no attribute of ownership in the land." Payment or *tender* at any time after the debt becomes due, and before foreclosure, destroys the lien of the mortgage. A mortgagor has his "*law* day" until foreclosure. A mortgagor's right in land, both before and after default, is misnamed "an equity

[1] Durand *v.* Isaacks, 4 McCord, 54; Mitchell *v.* Bogan, 11 Rich. (Law) 686.
[2] Elfe *v.* Cole, 26 Ga. 200; Nagle *v.* Macy, 9 Cal. 428.
[3] Carpenter *v.* Brenham, 40 Cal. 221.
[4] Walker, Am. Law, 302.

of redemption." It is a legal estate with all its attributes and incidents. If the mortgagee takes possession, the title remains as it was before. A mortgagor's right may be sold by the mortgagee on execution rendered upon the debt secured by the mortgage. A mortgagor may have trespass against the mortgagee. Nor does the possession of a mortgagee divest the technical legal fee of the mortgagor.[1] And a case is added to give a like idea of these rights by the law of Pennsylvania. After condition broken, a mortgagee may enter upon or maintain ejectment for the land. Nor can he be dispossessed by the mortgagor so long as the mortgage is in force. But as between the mortgagor and all others than the mortgagee, the mortgage is a mere lien, a security, but not an estate. Between the parties to the instrument or their privies, it is a grant, and passes the *legal title* to the mortgagee, and only leaves in the mortgagor a right to redeem the estate. One, therefore, claiming under a mortgagor, cannot have ejectment against any one in possession under the mortgagee, so long as the mortgage is outstanding.[2] In Illinois, if a mortgagee has entered for condition broken, and the debt is then satisfied, the mortgagor may have ejectment against him to regain possession.[3] In Iowa the interest of the mortgagor in lands is no way affected by the mortgage before entry and foreclosure, further than by the lien created.[4]

8. And it is substantially held in all the States enumerated below, that, for purposes of remedy and security, a mortgagee, after condition broken, may resort to the same measures in law as the holder of a legal estate.[5] The courts in New Hampshire, in order, apparently, to avoid the seeming incongruity of treating a mortgage as a mere chose in action,

[1] Trimm *v.* Marsh, 54 N. Y. 599. [2] Brobst *v.* Brock, 10 Wall. 530.

[3] Holt *v.* Rees, 44 Ill. 30. [4] White *v.* Rittenmyer, 30 Iowa, 273.

[5] Wilson *v.* Hooper, 13 Vt. 653; North Carolina, Fuller *v.* Wadsworth, 2 Ired. 263; Missouri, Walcop *v.* McKinney, 10 Mo. 229; Sutton *v.* Mason, 38 Mo. 120; Tennessee, Henshaw *v.* Wells, 9 Humph. 568; Mississippi, McIntyre *v.* Whitfield, 13 S. & M. 88; Stevens *v.* Brown, Walker, Ch. 41; Alabama, Smith *v.* Taylor, 9 Ala. 633; Doe *v.* McLoskey, 1 Ala. 708; Arkansas, Kannady *v.* McCarron, 18 Ark. 166; Gilchrist *v.* Patterson, Id. 575; Maryland, Ing *v.* Cromwell, 4 Md. 31; Jamieson *v.* Bruce, 6 Gill & J. 72; Brown *v.* Stewart, 1 Md. Ch. Dec. 87; Maine, Tuttle *v.* Lane, 17 Me. 437; Massachusetts, Erskine *v.* Townsend, 2 Mass. 493.

a something transferable by a simple transfer of the debt, and of declaring void a conveyance by the mortgagee of the mortgaged premises without expressly assigning the debt, while they give to mortgages so many incidents of legal estate, have decided that for certain purposes, namely, so far as it is necessary to protect his rights as mortgagee, "he is undoubtedly to be treated as the owner of the land." But that "the right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to protect or avail himself of his just rights intended to be secured to him by the mortgage." [1] But in a subsequent case the court held, that a deed of conveyance by a mortgagee in possession "was entirely sufficient to convey his mortgage interest, though it did not in terms purport to convey the debt." [2]

*9. This, what may be called common-law right in [*518] a mortgagee to enter and take possession of the premises at any time, is restricted altogether, as has been shown, in some States by statute. In others, as in Vermont and Wisconsin, a mortgagor has a right by statute to retain possession until condition broken, unless there is a clause inserted in the deed giving such right of entry.[3] In Indiana and Iowa the mortgagor has a right to the possession of the mortgaged premises, unless provision is otherwise made in the mortgage deed.[4] In New York, in the absence of any special clause to the contrary, the mortgagee has no right to the rents, nor any lien upon them before foreclosure and sale. The mortgagor, though insolvent, may enjoy them,[5] while it is always competent for the mortgagor to restrict the right of the mortgagee to enter until after condition broken, by a clause in the mortgage deed.[6] Nor is it necessary that this

[1] Ellison *v.* Daniels, 11 N. H. 274. See Smith *v.* Smith, 15 N. H. 55; Hobson *v.* Roles, 20 N. H. 41; Orr *v.* Hadley, 36 N. H. 578.

[2] Lamprey *v.* Nudd, 9 Fost. (N. H.) 299. In Hobson *v.* Roles, 20 N. H. 41, it was held, that a deed by a mortgagee, not in possession, conveys no interest without an accompanying assignment of the debt.

[3] Comp. Stat. Vt. 1850, p. 286, § 12; Gen. Stat. 1862, p. 339.

[4] Smith *v.* Parks, 22 Ind. 61; Chase *v.* Abbott, 20 Iowa, 158.

[5] Syracuse City Bank *v.* Tallman, 31 Barb. 201.

[6] Coote, Mortg. 343; Flagg *v.* Flagg, 11 Pick. 475; Brown *v.* Cram, 1 N. H. 169; Hartshorn *v.* Hubbard, 2 N. H. 453.

clause should in direct terms negative the mortgagee's right of entry. It will be sufficient if the nature of the condition requires the mortgagor to hold possession in order to perform it; or if by the terms of the condition, such possession in the mortgagor is necessarily implied.[1] But such a restriction will not be inferred from the mortgagor's having been permitted to occupy the premises, nor from such being the usage of the country.[2] Nor would it be inferred from a covenant being inserted in the instrument giving the mortgagee a right to enter upon default made.[3] But a parol agreement that the mortgagor should continue to occupy would not be sufficient, as it seems,[4] though it has been held that an agreement to that effect might be if inserted in the note.[5]

10. These rights and liabilities of mortgagor and mortgagee, in respect to taking and holding possession, extend to their respective assignees.[6] Thus a second mortgage is as to the second mortgagee but an assignment of the mortgagor's interest; though, as against the mortgagor, it is such a transfer of the interest of the latter, that, if the first mortgage is discharged, the second comes into its place as a first mortgage. As assignee of the mortgagor, the second mortgagee may insist upon all the rights of the mortgagor against the first mortgagee, such as that of calling him to account, redeeming from him, and the like.[7] But the converse of this proposition is not true, to the extent that a second mortgagee, or a purchaser from a mortgagor, assumes the liability of the mortgagor,

[1] Wales *v.* Mellen, 1 Gray, 512; Lamb *v.* Foss, 21 Me. 240; Brown *v.* Leach, 35 Me. 39; Norton *v.* Webb, 35 Me. 218; Dearborn *v.* Dearborn, 9 N. H. 117; Flanders *v.* Lamphear, Id. 201; Rhoades *v.* Parker, 10 N. H. 83; Flagg *v.* Flagg, 11 Pick. 475; Clay *v.* Wren, 34 Me. 187.

[2] Stowell *v.* Pike, 2 Greenl. 387; Brown *v.* Cram, 1 N. H. 169; Hartshorn *v.* Hubbard, 2 N. H. 453. But see *contra*, Jackson *v.* Hopkins, 18 Johns. 487.

[3] Rogers *v.* Grazebrook, 8 Q. B. 895.

[4] Colman *v.* Packard, 16 Mass. 39.

[5] Clay *v.* Wren, 34 Me. 187.

[6] Jackson *v.* Minkler, 10 Johns. 480; Jackson *v.* Bowen, 7 Cow. 13; Belding *v.* Manly, 21 Vt. 551; Erskine *v.* Townsend, 2 Mass. 493; Gould *v.* Newman, 6 Mass. 239; Northampton Mills *v.* Ames, 8 Met. 1; Jackson *v.* Fuller, 4 Johns. 215; Jackson *v.* Hopkins, 18 Johns. 487; Jackson *v.* Stackhouse, 1 Cow. 122; Henshaw *v.* Wells, 9 Humph. 568; Eastman *v.* Batchelder, 36 N. H. 141; see *post*, p. *574.

[7] Goodman *v.* White, 26 Conn. 317.

except so far as it is charged upon the estate specifically. He may or may not redeem the estate from the first mortgage at his election, or do any act to prevent a foreclosure of the same.[1] Such assignee of the mortgagor does not become personally liable for the mortgage debt, in the absence of express agreement upon the subject,[2] even though the deed under which he claims conveys the estate "subject to an outstanding mortgage."[3] And even where the mortgagor's deed recited that a part of the consideration was that the grantee was to pay the mortgage debt, it was held not to make the purchaser personally liable for the debt.[4] In determining the order of precedence of rights as assignees, where there are several successive mortgages, and any thing remains after satisfying the first mortgage, reference would ordinarily be had to the order of their record. But it is competent to show that, where two mortgages were made, it was agreed by one of the mortgagees that the mortgage of the other should take precedence: so the third mortgagee may show that the second deed never was delivered, or was delivered upon a condition which had never been performed.[5] If, after such second mortgage, the first buys in the mortgagor's equity, he does not thereby affect the second mortgagee's right to redeem from the first mortgage.[6]

* 11. It becomes, therefore, important to ascertain [*519] how mortgagees may assign their interest, lien, or estate. And this will be found to present some of the most difficult rules and decisions to reconcile or reduce to any thing like an harmonious system. It may be assumed as a general proposition, that whatever may be the term applied to a mortgagee's interest, whether lien or estate, it requires a deed to create it; and the ordinary rules of registration apply to this

[1] McIntier *v.* Shaw, 6 Allen, 85.

[2] Johnson *v.* Morrell, 13 Iowa, 301; Aufricht *v.* Northrop, 20 Iowa, 62; Comstock *v.* Hitt, 37 Ill. 542.

[3] Pike *v.* Goodnow, 12 Allen, 474; Strong *v.* Converse, 8 Allen, 559; *post*, *571.

[4] Mason *v.* Barnard, 36 Mo. 392; *post*, *545, *571, *672.

[5] Freeman *v.* Schroeder, 43 Barb. 618; Wilsey *v.* Dennis, 44 Barb. 359.

[6] Thompson *v.* Chandler, 7 Me. 377.

as to other deeds of conveyance.[1] No one but a second assignee of a mortgage, or some one claiming under such mortgage, can take advantage of a want of record by the first assignee. Thus, where A mortgaged his estate to B, who assigned the mortgage to C, who failed to record it. A then conveyed the estate to B by deed, which was recorded, and B sold the same with covenants of warranty to the defendant, who had no knowledge of B's assignment of the debt to C, and who, after all this, recorded his deed of assignment, and commenced proceedings to foreclose the mortgage. The court held that the defendant could not set up a want of notice of such assignment, inasmuch as, after B's assignment of his mortgage, all he acquired from A was an equity of redemption to redeem from an outstanding mortgage, of which the record is notice to all, and the defendant stood in his place. But a second assignee, without notice, takes precedence of the prior unrecorded assignment.[2] If the assignment of a mortgage is recorded, a subsequent release by the mortgagee to one claiming under the mortgagor, or dealing with the mortgage, would be of no validity as to such assignee.[3] If a mortgagee in possession convey the estate by quitclaim deed, it passes all the title and interest he has in the premises.[4] But if the mortgagee be out of possession, and the mortgagor, or one claiming under him, is in possession of the premises, an assignment by the mortgagee will be good, although he may have been ousted by one holding a prior mortgage of the premises.[5] Accordingly, the interests of a mortgagee may be transferred or conveyed by the same form of deeds

[1] Schmidt *v.* Hoyt, 1 Edw. Ch. 652; Johnson *v.* Stagg, 2 Johns. 524; Vanderkemp *v.* Sheldon, 11 Paige, Ch. 28; Clark *v.* Jenkins, 5 Pick. 280; Rigney *v.* Lovejoy, 13 N. H. 247; Philips *v.* Bank of Lewiston, 18 Penn. St. 394; Erwin *v.* Shuey, 8 Ohio St. 510; Heard *v.* Evans, 1 Freeman, Ch. Miss. 84. In the latter case the Chancellor says: "The legal title was in H. (the mortgagee), subject to E.'s equity of redemption. They (the purchasers) were bound to have inquired whether that legal title had been divested out of H. and vested in E. This could only be done in one of two ways, — either by reconveyance of H., or an absolute payment or satisfaction of the mortgage debt."

[2] Purdy *v.* Huntington, 42 N. Y. 334; Campbell *v.* Vedder, 1 Abb. N. Y. Dec. 205, 302.

[3] Belden *v.* Meeker, 47 N. Y. 307; Campbell *v.* Vedder, *sup.*

[4] Connor *v.* Whitmore, 52 Me. 186. [5] Lincoln *v.* Emerson, 108 Mass. 87.

by which any owner of a legal estate can convey it; and the same respect to its being recorded or not is paid to one or more deeds of the same estate, as in other conveyances.[1] Not only is a mortgage a conveyance in fee of real estate, but an assignment of a mortgage is a conveyance of real estate to the assignee. And if a mortgagee mortgage the land of which he holds a mortgage, it will convey his interest in it.[2] So where a mortgagee assigned his bond and mortgage by a deed which was recorded, and the assignee then assigned to A, who did not cause his assignment to be recorded, the former then assigned it to B to secure a loan for one hundred dollars, and a debt already due of seventy-five dollars, and B put his assignment upon record. In a question of precedence between A and B, the court held that, to the extent that B was a purchaser for a valuable consideration paid, he should, by his prior registration, acquire a right prior to that of A. But that, as to his old debt, his equity was no greater than that of A, and it should be postponed to that of A.[3] So where A, to secure a loan of money, made a mortgage which the mortgagee failed to record, and then made a second mortgage to B to secure an existing debt, who had no notice of the first, it was held that the prior mortgage had precedence, as the second was made without any *new* consideration.[4] And in New York, where the mortgagee sold the estate for the purpose of foreclosing the mortgage, but failed to give proper notice to the mortgagor so as to operate as a foreclosure, it was held to constitute an assignment of the mortgage to the purchaser. And in Massachusetts, a warranty deed of the premises by the mortgagee in possession is held to be an assignment of the mortgage.[5] But if the mortgagee do not assign the debt with his interest as mortgagee, it makes such assignee trustee only for him who holds the debt.[6] It may

[1] Welch *v.* Priest, 8 Allen, 165.

[2] Cutter *v.* Davenport, 1 Pick. 81; Hutchins *v.* State Bank, 12 Met. 424; Rice *v.* Dewey, 13 Gray, 50; Murdock *v.* Chapman, 9 Gray, 156. See Givan *v.* Doe, 7 Blackf. 212.

[3] Picket *v.* Barron, 29 Barb. 504.

[4] Cary *v.* White, 52 N. Y. 138.

[5] Robinson *v.* Ryan, 25 N. Y. 320, 325; Jackson *v.* Bowen, 7 Cowen, 13; Ruggles *v.* Barton, 13 Gray, 506.

[6] Sanger *v.* Bancroft, 12 Gray, 367. See Symes *v.* Hill, Quincy, 318.

be remarked that the assignment of a mortgage implies no guaranty as to the amount due thereon.[1]

12. Treating the interest of a mortgage as an interest in lands and tenements even of the most inconsiderable account, it cannot as a common-law right be assigned without a deed or note in writing signed by the mortgagee or his agent, or by act and operation of law in accordance with the third section of the statute of frauds.[2] In conformity with the notion that the legal interest of a mortgage is in the nature of an estate in lands, the courts of Massachusetts and Maine hold, that it can only be assigned by a deed which may be made upon the original mortgage deed, or by a separate instrument, without delivering over the original deed.[3] In Maine, therefore, the assignment of a mortgage debt passes no interest in the land, and the mortgagee may sue for and recover possession of the same.[4] Therefore, an assignment of a mortgage debt, and mortgage by an instrument in writing, not under seal, does not pass the mortgagee's interest. It must be by deed acknowledged and recorded.[5] And even in Pennsyl-
[*520] vania, where some of the cases * regard a mortgagee's interest so little like a legal estate in lands, the court use this language in a modern case: "A mortgage is in form a conveyance of the land, and an assignment of it is another conveyance of the same land. The assignment of a mortgage is therefore within the language of the recording act," &c.[6]

[1] Bree *v.* Holbeck, Doug. 655; Hammond *v.* Lewis, 1 How. 14.

[2] See also Warden *v.* Adams, 15 Mass. 233.

[3] Parsons *v.* Welles, 17 Mass. 419; Warden *v.* Adams, 15 Mass. 233; Gould *v.* Newman, 6 Mass. 239; Vose *v.* Handy, 2 Greenl. 322; Prescott *v.* Ellingwood, 23 Me. 345; Lyford *v.* Ross, 33 Me. 196; Dwinel *v.* Perley, 32 Me. 197; Young *v.* Miller, 6 Gray, 152; Mitchell *v.* Burnham, 44 Me. 286; Ruggles *v.* Barton, 13 Gray, 506.

[4] Stanley *v.* Kempton, 59 Me. 472.

[5] Adams *v.* Parker, 12 Gray, 53.

[6] Philips *v.* Bank of Lewiston, 18 Penn. St. 394. So in Indiana, Givan *v.* Doe, 7 Blackf. 210; so in New York, Williams *v.* Birbeck, 1 Hoff. Ch. 369; Fort *v.* Burch, &c., 5 Denio, 187; Mitchell *v.* Burnham, 44 Me. 302; Hutchins *v.* State Bank, 12 Met. 424; Swartz *v.* Leist, 13 Ohio St. 419; Henderson *v.* Pilgrim, 22 Tex. 464. And in Ohio, it was held, that an *unrecorded* assignment, though an equitable one, is inoperative against third parties in law and in equity. Fosdick *v.* Barr, 3 Ohio St. 471. But in New Hampshire the assignment of a mortgage, even though made by deed, need not be recorded. Wilson *v.* Kimball, 7 Fost. (N. H.) 300.

But an assignment of a mortgage debt in Pennsylvania transfers the right to the mortgage itself. A devise of all a testator's personal property passes his mortgages, and whatever will carry money secured by a mortgage will carry the mortgagee's interest in the mortgaged premises.[1] Accordingly, it has been held, that if a mortgagor make demand of and tender to the mortgagee for purposes of redemption, and bring his bill accordingly, it will be effectual, though the mortgage may have been assigned, if he has not been notified of such assignment, or it has not been recorded.[2] But in California it is doubted if the assignment of a mortgage comes within the category of "real estate," or "an interest in real estate."[3]

13. It has accordingly been held, that a deed of quitclaim or mortgage of the premises in usual form, by the mortgagee to a third party, would operate as an assignment of his interest as mortgagee;[4] and a deed with covenants of warranty would convey all the grantor's right, and operate as an equitable assignment of the debt secured by the mortgage.[5] If the mortgagee convey a part of the mortgaged premises to a purchaser by a separate deed, it does not extinguish the mortgage on that part as to the mortgagor; it only transfers the interest of the mortgagee in that part of the estate.[6] In the

[1] Moore *v.* Cornell, 68 Penn. St. 322.

[2] Mitchell *v.* Burnham, 44 Me. 302; Henderson *v.* Pilgrim, 22 Tex. 464; Gregory *v.* Savage, 32 Conn. 250.

[3] McCabe *v.* Grey, 20 Cal. 516.

[4] Hunt *v.* Hunt, 14 Pick. 374; Freeman *v.* M'Gaw, 15 Pick. 82, in which separate obligations to pay had been given by the mortgagor. Barker *v.* Parker, 4 Pick. 505; Warden *v.* Adams, 15 Mass. 233; Cole *v.* Edgerly, 48 Me. 112; Murdock *v.* Chapman, 9 Gray, 156; Givan *v.* Doe, 7 Blackf. 210; Dorkray *v.* Noble, 8 Greenl. 278, where there was not a separate obligation. Crooker *v.* Jewell, 31 Me. 306. The same is held in Vermont. Collamer *v.* Langdon, 29 Vt. 32. *Contra*, in New Hampshire, Furbush *v.* Goodwin, 5 Fost. (N. H.) 425; Welch *v.* Priest, 8 Allen, 165; Savage *v.* Hall, 12 Gray, 364; Conner *v.* Whitmore, 52 Me. 186.

[5] Lawrence *v.* Stratton, 6 Cush. 163; Ruggles *v.* Barton, 13 Gray, 500. See also Givan *v.* Doe, 7 Blackf. 210; Olmstead *v.* Elder, 2 Sandf. 325. *Contra*, Wilson *v.* Troup, 2 Cow. 195. Whether such a deed of warranty will transfer a mortgage debt in New Hampshire, *quære*. Weeks *v.* Eaton, 15 N. H. 145; Kilborn *v.* Robbins, 8 Allen, 472; Hinds *v.* Ballou, 44 N. H. 621.

[6] Wyman *v.* Hooper, 2 Gray, 141; Grover *v.* Thatcher, 4 Gray, 526. The effect of a conveyance or transfer of the mortgagee's legal estate upon the debt itself will be further considered hereafter. See Belding *v.* Manly, 21 Vt. 550.

following States it is held that the legal interest in a mortgage deed can be transferred or assigned, but not without a sealed instrument.[1]

[*521] 14. In New York and New Hampshire, on the contrary, it * is held, that a conveyance or assignment of the mortgaged premises, without specifically assigning the debt or what is equivalent, would be void. It would pass no estate, and any one holding under such a deed would be as to the mortgagor a trespasser. This is based upon the idea that the debt is the principal thing; that it cannot be detached from the interest in the land; and a subsequent assignment of the debt would pass the land, notwithstanding such prior deed.[2] The same rule of construction has been adopted as law in the following States.[3] Thus, in Minnesota, a mortgagee until foreclosure sale, or at least until after entry for condition broken, has no interest which he can convey; and, unless the conveyance carry the debt, it is simply null and of no effect. So also in New York.[4]

15. The final result of making the real estate security for the mortgage debt, while the equitable principle is fully sus-

[1] New Jersey, Den *v.* Dimon, 5 Halst. 156; Kinna *v.* Smith, 2 Green, Ch. 14; Indiana, Givan *v.* Doe, 7 Blackf. 210, requires a deed; Alabama, not without a deed, Graham *v.* Newman, 21 Ala. 497; Cutter *v.* Davenport, 1 Pick. 81.

[2] Wilson *v.* Troup, 2 Cow. 195; Jackson *v.* Bronson, 19 Johns. 325; Aymar *v.* Bill, 5 Johns. Ch. 570; Jackson *v.* Willard, 4 Johns. 41; Smith *v.* Moore, 11 N. H. 55; Ellison *v.* Daniels, 11 N. H. 274; Southerin *v.* Mendum, 5 N. H. 420; Furbush *v.* Goodwin, 5 Fost. (N. H.) 425; Lamprey *v.* Nudd, 9 Fost. (N. H.) 299; Weeks *v.* Eaton, 15 N. H. 145; Smith *v.* Smith, Id. 55. In this case, however, it was conceded, that, if the mortgagee was in possession, his deed would pass his rights as mortgagee; Wallace *v.* Goodall, 18 N. H. 449, and Hinds *v.* Ballou, 44 N. H. 621, reaffirming this doctrine. See also Hutchins *v.* Carleton, 19 N. H. 487; Hobson *v.* Roles, 20 N. H. 41.

[3] Alabama, Doe *v.* McLoskey, 1 Ala. 708; California, Peters *v.* Jamestown Bridge, 5 Cal. 334; Connecticut, Huntington *v.* Smith, 4 Conn. 235; Iowa, Rankin *v.* Major, 9 Iowa, 297; Missouri, Thayer *v.* Campbell, 9 Mo. 280; Mississippi, Bayley *v.* Gould, Walker, Ch. 478; Dick *v.* Mawry, 9 S. and M. 448; Kentucky, Burdett *v.* Clay, 8 B. Mon. 287; Willis *v.* Valette, 4 Met. (Ky.) 195; Tennessee, McGan *v.* Marshall, 7 Humph. 121; Indiana, Blair *v.* Bass, 4 Blackf. 539; Martin *v.* McReynolds, 6 Mich. 73; Ladue *v.* Detroit, &c. R. R., 13 Mich. 396; Nagle *v.* Macy, 9 Cal. 426; Perkins *v.* Sterne, 23 Tex. 563; Wisconsin, Hays *v.* Lewis, 17 Wis. 212.

[4] Hill *v.* Edwards, 11 Minn. 29; Merritt *v.* Bartholick, 36 N. Y. 44; Purdy *v* Huntington, 42 N. Y. 346; Jackson *v.* Willard, 4 Johns. 43.

tained which relieves the estate from forfeiture at law, and secures to the mortgagor his right of redemption, is substantially the same in all these States, as well as by the English law. The difference is in the mode of attaining it. In Massachusetts, for instance, it is reached without doing violence to the statute of frauds, or the rules of evidence which are generally understood to be the same in courts of law and equity, so far as they relate to contradicting or substantially varying the legal import of a written instrument. While it gives effect to the legal character of the mortgagee's estate as to its creation and assignment, it protects the rights of the holder of the debt intended to be secured, by regarding the title of the one who has the mortgage estate as imperfect and incomplete until foreclosed; and, in the next place, it gives the holder of the debt the benefit of this estate by the way of security, by regarding and treating the * holder [*522] of the legal estate as in all respects the trustee of such creditor. In this way equity has full power, by the ordinary rules which it applies, to carry out the purpose and design of the mortgage. In one sense, therefore, a mortgage here is, in the language of the court in the case cited below, "in fact but a chose in action, at least until entry to foreclose; although the legal effect of the mortgage is to give an immediate right of entry, or of action to the mortgagee, yet the estate does not become his, in fact, until he does some act to divest the mortgagor."[1]

16. Until such foreclosure, the mortgagee, after all, has rather a right, at his election, to acquire an absolute estate, in the nature of a new purchase, by such foreclosure, than a complete estate at common law with its ordinary incidents.[2] And until foreclosure, a mortgagee in possession is so far regarded as a trustee of the mortgagor, that he can do nothing which is imposed upon him, or which he acquires a right to do by virtue of his possession, and claim a personal benefit therefrom, if the mortgagor offers to redeem. Thus, for

[1] Eaton *v.* Whiting, 3 Pick. 484.

[2] Brigham *v.* Winchester, 1 Met. 390; Fay *v.* Cheney, 14 Pick. 399; Goodwin *v.* Richardson, 11 Mass. 469; Eaton *v.* Whiting, 3 Pick. 484; Smith *v.* People's Bank, 24 Me. 194, 195; Lincoln *v.* White, 30 Me. 291.

instance, if a mortgagee in possession suffer the land to be sold for taxes, and bids the estate in, in his own name, he cannot set up such title against his mortgagor, and can only charge what he paid to save the estate in his account as mortgagee.[1] So far as he holds as trustee, it is, first, for his own security; and second, any surplus for the benefit of the mortgagor, to reconvey the estate on being paid the debt within the time limited by the statute, and, if redeemed, to account for the rents and profits. But he is not, as such trustee, under any obligation to redeem from a prior mortgage, or do any act to prevent a foreclosure upon such mortgage.[2] So if, as such mortgagee in possession, he avails himself of the right to renew a lease, it will be deemed for the benefit of the party who is entitled to the estate.[3]

17. This, however, bears only upon the legal estate of the holder of the mortgagee's interest. If, before such foreclosure, the debt secured had been assigned to a third person, as *bona fide* holder, the mortgagee or his assigns, holders of the legal estate, would be trustees thereof for the benefit of the creditor, with all the duties and obligations, in equity, of trustees, which will be hereafter more fully explained.[4] And if the mortgage be foreclosed by the one holding the legal estate in the mortgage, it will satisfy and bar the mortgage notes outstanding in the hands of others, in full or in part, according to the value of the estate. The mortgagor himself is discharged by such foreclosure, leaving the holders of the notes to adjust the effect of the satisfaction between themselves.[5] And the same principle applies where, as in England, the legal estate of a mortgagee descends to his heirs, while the

[1] Story, Eq. § 1016; Brown *v.* Simons, 44 N. H. 475; Stewart *v.* Crosby, 50 Me. 134.

[2] McIntier *v.* Shaw, 6 Allen, 85; Bethlehem *v.* Annis, 40 N. H. 40.

[3] Holridge *v.* Gillespie, 2 Johns. Ch. 30, 33; Rakestraw *v.* Brewer, 2 P. Wms. 511. See *ante*, p. *430; *post*, p. *577.

[4] Story, Eq. Jur. § 1023, n.; Crane *v.* March, 4 Pick. 131; Parsons *v.* Welles, 17 Mass. 419; Young *v.* Miller, 6 Gray, 152; Moore *v.* Ware, 38 Me. 496; Johnson *v.* Candage, 31 Me. 28; Bryant *v.* Damon, 6 Gray, 564; Read *v.* Trowbridge, 8 Mass. 558; Warren *v.* Homestead, 33 Me. 256; Center *v.* P. & M. Bank, 22 Ala. 743; Keyes *v.* Wood, 21 Vt. 331.

[5] Haynes *v.* Wellington, 25 Me. 458; Patten *v.* Pearson, 57 Me. 434.

debt goes to his executors. The heir becomes trustee for the holder of the debt.[1] As full force and effect is, in this way, given to the equitable assignment of mortgages by transferring the mortgage debt, as in those States in which, as will be seen, such a transfer operated upon the legal estate. It makes such transferee a * *cestui que* [*523] *trust*, instead of an owner of the legal estate, an assignment of the debt being an equitable assignment of the mortgagee's interest, though it has no direct effect upon the title to the legal estate.[2] Nor could the mortgagor, after knowledge of such transfer, discharge the lien on the land by any tender or payment made to the mortgagee; nor would a discharge executed by the mortgagee, to one knowing of such transfer, operate to discharge the lien upon the estate in favor of the holder of the debt.[3] And, in this respect, the effect is the same, whether the transfer of the debt operates as an assignment of the mortgage, or a mere equitable assignment to be enforced through a trustee.[4]

18. In New Hampshire, and herein several other States coincide substantially as a rule of law, the transfer of a mortgage debt passes the interest of the mortgagee in the land itself, as completely and effectually as if done by a deed. And this transfer may be made by parol, though the debt is not negotiable in form, nor so transferred as that the assignee could maintain an action at law in his own name to recover it.[5] It was accordingly held by the court of the United

[1] Wms. Real Prop. 354.

[2] Young *v.* Miller, 6 Gray, 152; Damon *v.* Bryant, 6 Gray, 564; Warren *v.* Homestead, 33 Me. 256; Crane *v.* March, 4 Pick. 131; Cutler *v.* Haven, 8 Pick. 490. See Burton *v.* Baxter, 7 Blackf. 297; Graham *v.* Newman, 21 Ala. 497.

[3] Cutler *v.* Haven, 8 Pick. 490.

[4] Brown *v.* Blydenburgh, 3 Seld. 141; Page *v.* Pierce, 6 Fost. (N. H.) 317; Stevenson *v.* Black, Saxton (N. J.), Ch. 338; Keyes *v.* Wood, 21 Vt. 339; Donley *v.* Hays, 17 S. & R. 400; Pattison *v.* Hull, 9 Cow. 751; Henderson *v.* Herrod, 10 S. & M. 631; Cullum *v.* Erwin, 4 Ala. 452; Phelan *v.* Olney, 6 Cal. 478; Johnson *v.* Brown, 11 Fost. (N. H.) 405; Waterman *v.* Hunt, 2 R. I. 298, where it was held that two assignees of two distinct debts, secured by the same mortgage, have equal equities as to their respective debts in respect to the mortgage, though it was assigned to one only of them. See Gregory *v.* Savage, 32 Conn. 250; Henderson *v.* Pilgrim, 22 Tex. 464.

[5] Rigney *v.* Lovejoy, 13 N. H. 247; Smith *v.* Moore, 11 N. H. 55; Southerin *v.* Mendum, 5 N. H. 420; Blake *v.* Williams, 36 N. H. 39; Northy *v.* Northy, 45

States, that the assignment of a mortgage debt carries, in equity, the mortgage by which it is secured.[1] But such is not the law in Massachusetts.[2] And in Illinois, where a mortgagee had assigned the mortgage debt, and the assignee desired to foreclose the mortgage, it was held that he could only do it in the name of the mortgagee, he not having assigned the mortgage, on the ground that the assignment of the mortgage debt carried with it no legal interest in the mortgaged premises.[3]

[*524] *19. However variant the law may be as to the mode of effectually assigning the interest of a mortgagee, the rights of the assignee and other parties in interest, when the assignment has been made, are substantially the same. Some of these are as follows: As a general proposition, if there are several debts secured by the same mortgage, and these have been successively assigned, the assignees will share the benefit of the security *pro rata*.[4] It was accordingly held that the holder of a coupon taken from a bond

N. H. 144; Green *v.* Hart, 1 Johns. 581; Rickert *v.* Madeira, 1 Rawle, 325; Betz *v.* Heefner, 1 Penn. 280; Donley *v.* Hays, 17 S. & R. 400; *Contra*, Philips *v.* Bank of Lewiston, 18 Penn. St. 394; Jackson *v.* Blodget, 5 Cow. 202; Miles *v.* Gray, 4 B. Mon. 417; Crow *v.* Vance, 4 Iowa, 434; Vimont *v.* Stitt, 6 B. Mon. 477; Anderson *v.* Baumgartner, 27 Mo. 80; Wilson *v.* Troup, 2 Cow. 231; Jackson *v.* Bronson, 19 Johns. 325; Craft *v.* Webster, 4 Rawle, 242; Runyan *v.* Mersereau, 11 Johns. 534; Whittemore *v.* Gibbs, 4 Fost. (N. H.) 484; Clark *v.* Beach, 6 Conn. 142; Dudley *v.* Cadwell, 19 Conn. 218; Paine *v.* French, 4 Ohio, 318; Wilson *v.* Hayward, 2 Fla. 27; and 6 Fla. 191; Emanuel *v.* Hunt, 2 Ala. 190; Dick *v.* Mawry, 9 S. & M. 448; Burdett *v.* Clay, 8 B. Mon. 287; McConnel *v.* Hodson, 2 Gilm. 640; Dougherty *v.* Randall, 3 Mich. 581; Ladue *v.* Detroit, &c. Railroad, 13 Mich. 396; Ord *v.* McKee, 5 Cal. 515; Phelan *v.* Olney, 6 Cal. 478; Willis *v.* Farley, 24 Cal. 497; Fisher *v.* Otis, 3 Chand. (Wis.) 83; Martineau *v.* M'Collun, 4 Chand. (Wis.) 153; Davis *v.* Clay, 2 Mo. 130. See Martin *v.* McReynolds, 6 Mich. 73; Cooper *v.* Ulmann, Walker, Ch. 251; Kortright *v.* Cady, 21 N. Y. 364; Wright *v.* Eaves, 10 Rich. Eq. 585; Perkins *v.* Sterne, 23 Tex. 563; Harris *v.* Mills, 28 Ill. 46; Rankin *v.* Major, 9 Iowa, 297; Bank U. S. *v.* Covert, 13 Ohio, 240.

[1] Batesville Inst. *v.* Kauffeman, 18 Wall. 151.

[2] Symes *v.* Hill Quincy R. 324; Young *v.* Miller, 6 Gray, 152.

[3] Bourland *v.* Kipp, 55 Ill. 376.

[4] Waterman *v.* Hunt, 2 R. I. 298; Henderson *v.* Herrod, Keyes *v.* Wood, Pattison *v.* Hull, Phelan *v.* Olney, 6 Cal. 478; M'Clanahan *v.* Chambers, 1 Mon. 44; Mohler's Appeal, 5 Penn. St. 418; Bank of England *v.* Tarleton, 23 Miss. 178; Parker *v.* Mercer, 6 How. (Miss.) 320; Terry *v.* Woods, 6 S. & M. 139; Swartz *v.* Leist, 13 Ohio St. 419. See Page *v.* Pierce, 6 Foster (N. H.) 317.

which was secured by mortgage had a lien upon the mortgaged property;[1] though in some of the States the equities of the parties in such case attach to the assignees according to the order of priority in time.[2] But if the debts secured by the same mortgage are payable at different times, they are to be paid from the mortgage fund in the order in which they are due.[3] But it was held in Michigan, that if a mortgage secures several successive notes, or a debt payable in instalments, neither has precedence in equity to the benefit of the mortgage, as would be the case in successive mortgages. They are to be paid ratably out of the estate if it is insufficient to satisfy the whole.[4] And it is always competent for the holder of a mortgage made to secure several debts, so long as he retains them, to assign one or more of them in such a manner as to give the holder a preference as to these over the other debts.[5] And where a mortgage secured three notes, and the mortgagee assigned two of them with the mortgage, but not to affect his interest in the mortgage as security for the other note, and then assigned the other note to another person, and the assignee foreclosed the mortgage, it was held that he only acquired thereby a *pro rata* share of the estate in common with the mortgagee, and for himself alone, and not in trust for the holder of the other note. The action of the assignee had no effect upon the rights of such holder of the other note; he only foreclosed to the extent of his own interest.[6] From this doctrine, that the transfer of the debt passes the mortgage interest in the land, questions of no inconsiderable

[1] Mellen *v.* Rutland, &c. R. R., 40 Vt. 399; see Arents *v.* Com'th, 18 Gratt. 750.

[2] Cullum *v.* Erwin, 4 Ala. 452; Bank of Mobile *v.* Planters' Bank, 9 Ala. 645; Gwathmeys *v.* Ragland, 1 Rand. 466. See also State Bank *v.* Tweedy, 8 Blackf. 447.

[3] Bank of United States *v.* Covert, 13 Ohio, 240; Hunt *v.* Stiles, 10 N. H. 466; Wood *v.* Trask, 7 Wis. 566. Wilson *v.* Hayward, 6 Flor. 171; Marine Bank, &c. *v.* International Bank, 9 Wis. 57; Stevenson *v.* Black, Saxton (N. J.), 338.

[4] McCurdy *v.* Clark, 27 Mich. 445.

[5] Bryant *v.* Damon, 6 Gray, 164; Bank of England *v.* Tarleton, 23 Miss. 178; Mechanics' Bank *v.* Bank of Niagara, 9 Wend. 410; Cullum *v.* Erwin, 4 Ala. 452; Langdon *v.* Keith, 9 Vt. 299; Grattan *v.* Wiggins, 23 Cal. 30; Walker *v.* Dement, 42 Ill. 272.

[6] Lane *v.* Davis, 14 Allen, 225.

difficulty have arisen, where the same mortgage deed secures several distinct debts, like several notes of hand, and these have been transferred to different individuals without a formal assignment of the mortgage. In Indiana, it is considered as a separate mortgage in respect to each debt, and an assignment of one of these debts carries with it its proportion of the mortgage interest.[1] But in applying the proceeds of mortgaged premises resulting from a sale thereof, or from insurance paid upon the same, while the courts in some of the States distribute these to the holders of the several debts secured, *pro rata*, according to their respective amounts, as is done in California, Pennsylvania, and Mississippi. In those hereafter named, such proceeds, if insufficient to satisfy these debts in full, are applied in the order of their being payable, whether in the form of separate notes or debts payable in instalments, and not *pro rata* as if they were successive mortgages according to the order of such payments. Alabama, Florida, Iowa, Illinois, Maine, Missouri, Ohio, Virginia, and Wisconsin.[2] In Maine, if a mortgage be made to several to secure separate debts, it creates a tenancy in common in the mortgagees. They may join in a suit upon it, or sue alone.[3] But in Illinois, if a mortgage is made to secure several notes payable in succession, and these are assigned to different individuals, the holders of these notes are considered in the light of successive mortgagees under separate mortgages. And if the holder of the second pay the first in order to redeem from that, he may, when he forecloses, include his own and the prior note which he has paid.[4]

20. It is assumed in one case that the rights of parties in respect to the assignment of a debt secured by mortgage will be governed by the law of the place where the agreement is

[1] Sample *v.* Rowe, 24 Ind. 215.

[2] Grattan *v.* Wiggins, 23 Cal. 30; Darby *v.* Hays, 17 S. & R. 400; Henderson *v.* Herrod, 10 Sm. & M. 631; McVay *v.* Bloodgood, 9 Porter, 547; Wilson *v.* Hayward, 6 Flor. 171; Hinds *v.* Mooers, 11 Iowa, 211; Reeder *v.* Carey, 13 Iowa, 274; Massie *v.* Sharp, 13 Iowa, 542; Isett *v.* Lucas, 17 Iowa, 506; Funk *v.* McReynolds, 33 Ill. 497; Larrabee *v.* Lumbert, 32 Me. 97; Mitchell *v.* Laden, 36 Mo. 532; Thompson *v.* Field, 38 Mo. 325; Bank, United States *v.* Covert, 13 Ohio, 240; Gwathmeys *v.* Ragland, 1 Rand. 466; Wood *v.* Trask, 7 Wis. 566.

[3] Brown *v.* Bates, 55 Me. 520.

[4] Preston *v.* Hodges, 50 Ill. 56.

made.[1] But if it is to be regarded as a transfer of a legal interest in real estate, it would seem that the mode of making it should be governed by the *lex rei sitæ*, the law of the place where the land is situate.[2]

21. While, as has been seen, the consequences and effect, in equity, are substantially the same, so far as the assignee of a *mortgage is concerned, whether the [*525] assignment be made by deed, instrument in writing, or parol, there are various and seemingly conflicting modes of enforcing these rights of an assignee by judicial process. In Massachusetts, Maine, and New Hampshire, for instance, one remedy of a mortgagee, where the condition of his mortgage has been broken, is by a suit at common law, wherein he recovers possession of the premises. The judgment in such a case is, that, if the defendant shall fail to pay a certain sum within so many days, the plaintiff shall have possession. So that, if the debt shall have been paid, the plaintiff can never get a judgment for possession. And in New Hampshire, the process and judgment are the same as in Massachusetts.[3] Accordingly, not only may a second mortgagee maintain process to foreclose against the mortgagor, while the first mortgagee is in possession for the purpose of foreclosure,[4] but where the assignee of a first mortgage, who had entered to foreclose under it, was also the owner of the equity of redemption, or a third mortgagee, it was held that a second mortgagee might maintain a process of foreclosure against him in respect to such equity or third mortgage, and might have a judgment for possession, under which he may be put temporarily into possession of the premises, and it would not work an ouster of the first mortgagee.[5] If a second mortgagee foreclose as to the mortgagor, and then redeems from the first, it gives the

[1] Bank of England *v.* Tarleton, 23 Miss. 175. See also Dundas *v.* Bowler, 3 McLean, 397.

[2] Story, Confl. Laws, §§ 363, 364; Westlake, Confl. Laws, § 86; Goddard *v.* Sawyer, 9 Allen, 78.

[3] Green *v.* Cross, 45 N. H. 581; Slayton *v.* McIntire, 11 Gray, 274; Burke *v.* Millen, 4 Gray, 116; Pike *v.* Goodnow, 12 Allen, 473; Wade *v.* Howard, 11 Pick. 289; *post*, pl. 22.

[4] Amidown *v.* Peck, 11 Met. 469.

[5] Cronin *v.* Hazletine, 3 Allen, 324; Palmer *v.* Fowley, 5 Gray, 545.

mortgagor no new right to redeem from him.[1] Nor is it any objection to a mortgagee's maintaining process to foreclose his mortgage, that it conveys only a reversion, and the tenant for life of the prior estate is still alive.[2] And in the two former States the action is by whoever has the legal estate by deed, with certain exceptions in case of the death of the mortgagee. Thus the grantee of a mortgagee in possession for condition broken, under a deed with warranty, but without any transfer made at the time of the note secured by the mortgage, was held entitled to judgment in an action to foreclose the tenant's equity of redemption, upon producing and filing in court the note so secured.[3] In some of the States, as will hereafter be shown when considering the subject of foreclosure, this remedy is attained by sale of the mortgaged premises according to the prescribed forms of law. In most of the States, the remedy of the mortgagee is by proceedings in equity; in some, by what is called a strict foreclosure, such as is usually pursued in England; in others, by some other form, which, as courts having equity powers, they are authorized to apply. In such cases there is no incongruity in treating an assignment by parol, as, for instance, by a delivery of the mortgage with the evidence of the debt thereby secured, as good and sufficient to pass the real estate itself. But to treat such an equitable assignment as conveying a legal estate in the land, and giving such assignee a right to recover in a court of common law, upon his own seisin, is apt to strike the mind as an essential departure from the known rules governing the titles and conveyances of lands. But such seems to be the rule of law sustained by a series of decisions in the courts of New Hampshire. Thus in Southerin *v.* Mendum, which was a writ of entry, wherein the demandants *counted upon their own seisin*, the tenant had made a note payable to one M. or bearer, and a mortgage to him to secure it. The attorney of M. delivered the note to the demandants, and it was held by the court that "they (the demandants) thus became the legal holders of the note, and as such were entitled to maintain an action on the mortgage in their own

[1] Colwell *v.* Warner, 36 Conn. 234.

[2] Penniman *v.* Hollis, 13 Mass. 429. [3] Ruggles *v.* Barton, 13 Gray, 506.

names as assignees without any other evidence of assignment."[1] And one of several mortgagees or assignees * may join the others in a suit at law upon the mort- [*526] gage, giving security for costs, and the judgment would be upon the whole land.[2]

22. Somewhat analogous to the question how a mortgagee's interest may be assigned, is that, as to how, when he shall have once gained possession of the premises, he may be divested of his legal seisin and estate. If this possession is gained before the condition of the mortgage is broken, the payment, cancelling, or discharging of the debt, before that has happened, defeats the estate of the mortgagee altogether, without any act on his part. And this, it is believed, is universally applicable in this country, as well as in England. The effect of a payment or cancelling of the debt after condition broken is different in different States, and in the same State under different circumstances. Thus, in Massachusetts, for instance, if the mortgagee sues to enforce his mortgage, and declares upon it as such, he can only have a judgment for possession after so many days, if the mortgagor fails before that time to pay a liquidated sum, being the amount due; so that if the debt has really been paid, it operates as an effectual discharge of the mortgage, since it can no longer be enforced.[3] And the same effect, though in somewhat different

[1] Southerin *v.* Mendum, 5 N. H. 420; Smith *v.* Moore, 11 N. H. 55; Rigney *v.* Lovejoy, 13 N. H. 247; Paige *v.* Pierce, 6 Foster (N. H.) 321. If any other State adopts the same doctrine, the authority for the same has been overlooked. The language of the eminent jurist, then Ch. J., in Smith *v.* Moore, p. 55, in view of the law on this subject, is: "Unless the different purposes of a mortgage are adverted to, there would appear to be much confusion in the books relative to the rights of the mortgagor and mortgagee; and with those purposes in view, an attempt to reconcile them would be made in vain." Some may think the Massachusetts system less obnoxious to the objection of confusion than that of New Hampshire.

[2] Johnson *v.* Brown, 11 Fost. (N. H.) 405.

[3] Wade *v.* Howard, 11 Pick. 289; Fay *v.* Cheney, 14 Pick. 399; Vose *v.* Handy, 2 Greenl. 322; Gray *v.* Jenks, 3 Mason, 520; Williams *v.* Thurlow, 31 Me. 392. Such is the law in Virginia, by statute, Code, 1849, p. 561, § 21. Stewart *v.* Crosby, 50 Me. 134; Webb *v.* Flanders, 32 Me. 175; Gray *v.* Jenks, 3 Mason, 520; Pike *v.* Goodnow, 12 Allen, 472, where the mortgagee by his dealings with a part of the mortgaged estate so satisfied the mortgage debt that he could not recover possession of the other portion of the estate in an action on his mortgage; *ante*, pl. 21.

form, would be produced by a like payment or discharge in Pennsylvania and Maryland.[1] But if the mortgagee shall have obtained possession by judgment or otherwise for condition broken, and the debt is satisfied while he is so in possession, the mortgagor is not remitted to his legal seisin [*527] and estate, nor is the seisin and estate of the * mortgagee defeated. The mortgagor's remedy in such a case is by a bill in equity; and if he enters upon the mortgagee without a proper decree, he may be treated as a trespasser.[2] It would be otherwise, however, if the mortgagee were to take possession after his debt had been satisfied.[3] Accordingly, in England, Massachusetts, and Maine, it requires a deed of conveyance or release in such a case to divest the mortgagee of his seisin and estate, and a tender of the debt after condition broken will not have the effect to discharge the mortgage,[4] while in New York, New Jersey, and Kentucky, no such deed is requisite.[5] And in Illinois, if the mortgagee have entered for condition broken, and the debt be paid, the mortgagor may have ejectment against him to recover possession of the premises.[6] But in those States where a transfer or extinguishment of the debt is a transfer or extinguishment of the mortgage estate, a payment or a voluntary forgiving of the debt has the same effect, even if done after condition broken,[7] So where a mortgage was

[1] Craft *v.* Webster, 4 Rawle, 253; Paxon *v.* Paul, 3 Har. & McH. 399. So in N. Jersey, Shields *v.* Lozear, 34 N. J. 496, 504.

[2] Wilson *v.* Ring, 40 Me. 116; Hill *v.* Moore, Id. 515; Wolfe *v.* Doe, 13 S. & M. 103; Howe *v.* Lewis, 14 Pick. 329; Parsons *v.* Welles, 17 Mass. 419. So in Connecticut, Kentucky, Virginia, and Mississippi. Smith *v.* Vincent, 15 Conn. 1; Dudley *v.* Cadwell, 19 Conn. 218; City of Norwich *v.* Hubbard, 22 Conn. 587; Breckenridge *v.* Brooks, 2 A. K. Marsh. 337; Faulkner *v.* Breckenbrough, 4 Rand. 245; Pearce *v.* Savage, 45 Me. 90; Pratt *v.* Skolfield, 45 Me. 386; Howard *v.* Howard, 3 Met. 557; Connor *v.* Whitmore, 52 Me. 186.

[3] Sibley *v.* Rider, 54 Me. 467.

[4] Currier *v.* Gale, 9 Allen, 522; Maynard *v.* Hunt, 5 Pick. 240.

[5] 2 Crabb, Real Prop. 866; Harrison *v.* Owen, 1 Atk. 520; Fay *v.* Cheney, 14 Pick. 399; Mass. Gen. Stat. 1860, c. 89, §§ 30, 31; Jackson *v.* Davis, 18 Johns. 7; Den *v.* Spinning, 1 Halst. 471; Armitage *v.* Wickliffe, 12 B. Mon. 488; Mitchell *v.* Burnham, 44 Me. 302.

[6] Holt *v.* Rees, 44 Ill. 30.

[7] Hawkins *v.* King, 2 A. K. Marsh. 108; Barnes *v.* Lee, 1 Bibb, 526; Craft *v.* Webster, 4 Rawle, 253; Jackson *v.* Bronson, 19 Johns. 325; Paxon *v.* Paul,

assigned to several, an aliquot part of the debt to each, the payment of the share of any one of these extinguishes his interest in the mortgage.[1] So a payment of the mortgage-debt rescinds the power of sale which may have been contained in the mortgage-deed;[2] and a tender of the debt, after the day of payment, bars the right to recover the land under the mortgage.[3]

23. After a mortgagee has assigned the mortgage, he can discharge no part of the premises from the mortgage by any formal release.[4] But while he holds it, he is not obliged to enforce it *pro rata* upon the several parcels embraced in the *same, though belonging to different persons. [*528] He has his election to enforce it upon all or any number of these.[5] Any agreement by parol at the time of making the mortgage, embracing several parcels, to discharge any one of them, upon the payment of a certain sum, is inoperative. Nor can a mortgagee in such a case, by releasing one or more of such parcels, throw more than a *pro rata* share of the mortgage-debt upon the other parcels, while in the hands of other persons than him by whom the agreement for such release is made.[6] And in one case, the court of Wisconsin carried this doctrine to the extent, that if there are two successive mortgages, or a mortgage and a subsequent grant of an estate, and the holder of the first mortgage release the *personal* liability of the mortgagor for his debt, he would thereby release his claim under the mortgage as against such second mortgagee

3 Har. & McH. 399; Rickert *v.* Madeira, 1 Rawle, 325; Runyan *v.* Mersereau, 11 Johns. 534; Cameron *v.* Irwin, 5 Hill, 272; Waring *v.* Smyth, 2 Barb. Ch. 119; Hadley *v.* Chapin, 11 Paige, Ch. 245; Blodgett *v.* Wadhams, Hill & Denio, 65; Anderson *v.* Neff, 11 S. & R. 208; Armitage *v.* Wickliffe, 12 B. Mon. 488; Perkins *v.* Dibble, 10 Ohio, 433; Thomas' Appeal, 30 Penn. St. 378; McMillan *v.* Richards, 9 Cal. 365; Fisher *v.* Otis, 3 Chand. (Wis.) 83; Ladue *v.* Detroit, &c. R. R. 13 Mich. 396; Ryan *v.* Dunlap, 17 Ill. 40; Sherman *v.* Sherman, 3 Ind. 337.

[1] Furbush *v.* Goodwin, 5 Fost. (N. H.) 425; s. p. Burnett *v.* Pratt, 22 Pick. 656.

[2] Cameron *v.* Irwin, 5 Hill, 272.

[3] Arnot *v.* Post, 6 Hill, 65; Farmers' Co. *v.* Edwards, 26 Wend. 541; Trimm *v.* Marsh, 54 N. Y. 599; Jackson *v.* Crofts, 18 Johns. 115.

[4] M'Cormick *v.* Digby, 8 Blackf. 99. [5] Hughes *v.* Edwards, 9 Wheat. 489.

[6] Stevens *v.* Cooper, 1 Johns. Ch. 425; Johnson *v.* Johnson, 4 Halst. Ch. 567.

or purchaser.[1] Thus, when a first mortgagee, with the knowledge that a subsequent mortgage has been made upon a part of the premises included in his mortgage, releases a part or all that portion of the premises which is not included in the second mortgage, and the remaining part of the estate is not sufficient to pay both mortgages, the first will be postponed to the second in applying the proceeds of the sale of the remaining part, to the extent that the second mortgagee was injured by the release. But the knowledge of the second mortgage, and that such release will injuriously affect that mortgagee, must be clearly brought home to the first mortgagee in order to affect him. The mere record of the second mortgage is not notice to the first mortgagee.[2] On the other hand, the assignee of a mortgage cannot, as a general proposition, enforce it for more than was actually due from the mortgagor to the mortgagee when it was assigned.[3] Nor would the assignee of the mortgagor be estopped to show part payment of the mortgage-debt made before such assignment, although the estate was conveyed to him subject to the mortgage-debt.[4] But in those States where a payment of the debt does not, *ipso facto*, discharge the mortgage, a parol agreement not to claim under the mortgage while the debt remains could not be enforced.[5]

24. The effect of the payment of a mortgage-debt, in operating as an assignment or otherwise of the mortgage, may be illustrated by the following case. The heir of a mortgagor sued to recover possession of land. One ground of defence was, that the tenant had paid the mortgage-debt, though he had never had the mortgage assigned to him, and he sought to use such payment as an equitable assignment under which he might hold against the mortgagor. The court of New Jersey held, "that no equitable title will avail in an action of

[1] Coyle *v.* Davis, 20 Wis. 564, 568.

[2] James *v.* Brown, 11 Mich. 25; 11 Am. Law Reg. 694. See also Reilly *v.* Mayor, 1 Beasley (N. J.), 59; Blair *v.* Ward, 2 Stockt. Ch. 126; Guion *v.* Knapp, 6 Paige, 43; Cheesebrough *v.* Millard, 1 Johns. Ch. 414; Salem *v.* Edgerly, 33 N. H. 50; Brown *v.* Simons, 45 N. H. 212; Inglehart *v.* Crane, 42 Ill. 261.

[3] Matthews *v.* Wallwyn, 4 Ves. 118.

[4] Hartley *v.* Tatham, 2 Abb. N. Y. 337, 339.

[5] Parker *v.* Barker, 2 Met. 423; Hunt *v.* Maynard, 6 Pick. 489.

ejectment. The cases in which it was once held have long been overruled. It has never been held at common law that payment of money for land gives a title without a conveyance. It may entitle the party to a decree for specific performance, on application to a court of equity; but the title itself remains unchanged, and may be conveyed to any other person not having notice of the contract." The conclusion of the court was, that a formal, actual assignment was necessary in order to enable an assignee to set up a mortgage against a mortgagor.[1] In another case, the wife of J. W. joined with him in a mortgage of her estate to secure his debt due upon a bond. The mortgagee, having been paid, assigned the bond and mortgage to S., who professed to hold them for N., who was J. W.'s attorney, and was furnished by him with the money for the purpose.. S. afterwards gave J. W. a certificate that he held them in trust for him. Afterwards N., by S.'s direction, assigned the bond and mortgage to Cotheal, who proceeded to foreclose under the statute of New York. The heirs at law of the wife, she having died, applied for an injunction to restrain the sale of the estate. It was held that J. W. being the principal debtor, and his wife a mere surety, when J. W. paid the debt it extinguished the lien on her land, and the formal assignment of the mortgage to S. in trust did not keep it alive.[2] If one having a right to redeem mortgaged premises pay the debt, it will be treated as an assignment to him of the mortgage, if it is manifestly for his interest, where the contrary is not clearly expressed or necessarily implied.[3] And an actual payment of the debt, with a promise to discharge the mortgage, was held in Maine to be no legal bar to the making use of the mortgagee's title, he having entered to foreclose the same.[4] So if a stranger volunteer to pay a mortgage-debt, he will not thereby acquire the mortgagee's rights without an actual assignment of the mortgage. Nor would he, though he paid the money at the request of the mortgagor, and under a verbal agreement that

[1] Den. *v.* Dimon, 5 Halst. 156. See also Kinna *v.* Smith, 2 Green. Ch. 14. See also Wade *v.* Howard, 11 Pick. 289. *Post*, *562.

[2] Fitch *v.* Cotheal, 2 Sandf. Ch. 29. But see Cole *v.* Edgerly, 48 Me. 108.

[3] Hinds *v.* Ballou, 44 N. H. 619.

[4] Leavitt *v.* Pratt, 53 Me. 14.

he might have the benefit of the mortgage as security. And where, as an inducement to a third party to pay the money due upon a mortgage, the mortgagor gave him a note for a certain sum as a bonus, and secured it by a mortgage upon the same land, it was held, that by making such payment he did not become equitable assignee of the mortgage.[1]

24 *a*. Among the cases illustrating the point when a payment of a mortgage operates as an assignment of it or otherwise, is one where the heir of a mortgagor set out dower and homestead to the widow of the mortgagor. To prevent a sale of the intestate's estate to pay debts, he gave a bond to that effect. He then paid the mortgage, and took an assignment of it. But he was not admitted to set it up against the widow, and thus defeat the validity of his own assignment to her.[2] A made a mortgage to B, to secure a debt, and then sold to C, subject to this debt, which C was to pay. He paid it, and had the mortgage assigned in blank. C owing D a debt, in order to secure it, inserted his name in the assignment of B's mortgage. C then sold the estate to E, the mortgage still standing unsatisfied upon the record. D having undertaken to enforce the mortgage as assignee thereof, E insisted that the payment by C in effect discharged it. But the court held that, between C and D, C would be estopped to deny the validity of the mortgage, and that E had no better rights against D than C had, and that the assignment was good and effectual.[3] So where A conveyed an estate to B, which was subject to a mortgage. B, having paid this mortgage, had it assigned to J. S., and it was held to be valid and effectual as against A, to whom B had given a mortgage to secure the purchase-money which was still due to A.[4] But where A held an unrecorded mortgage to secure a debt, and B, holding a note and mortgage upon another parcel of land, sued the note and levied and satisfied his execution upon the land mortgaged to A, it was held that, by this security for his debt having been applied to relieve the premises held by B

[1] Downer *v.* Wilson, 33 Vt. 1.

[2] King *v.* King, 100 Mass. 224; Draper *v.* Baker, 12 Cush. 288.

[3] Kellogg *v.* Ames, 41 N. Y. 259.

[4] Abbott *v.* Kasson, 72 Penn. 185

in mortgage, A became subrogated, as assignee of B's mortgage, as a security for his own debt.[1]

* 25. In view of the various and conflicting opinions [*529] which have been expressed by different courts upon the subject, it seems safe to adopt the language of the editor of the American edition of Crabb on Real Property, that "it is perhaps not going too far to say, that it is impossible to reconcile the various settled doctrines otherwise than by considering the title of the mortgagee, whenever he makes his election, as the legal title."[2] And the language of Shaw, C. J., in Ewer *v.* Hobbs, which has been expressly adopted by the court of Iowa, and a similar doctrine recognized by the courts of several of the States, may be properly quoted to the same point. "The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is, that, between the mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and, in other respects, dealt with as the estate of the mortgagor."[3]

26. It has accordingly been held, that a mortgagee of a reversion, subject to a widow's right of dower, upon entering for condition broken, may have waste against the tenant for

[1] Wall *v.* Mason, 102 Mass. 313.

[2] 2 Crabb, Real Prop. 858.

[3] Ewer *v.* Hobbs, 5 Met. 3; Porter *v.* Green, 4 Iowa, 576; Kennett *v.* Plummer, 28 Mo. 146; Savage *v.* Dooley, 28 Conn. 411; Mills *v.* Shepard, 30 Conn. 101; Wilkinson *v.* Flowers, 37 Miss. 579, 585; Tripe *v.* Marcy, 39 N. H. 439; Den *v.* Dimon, 5 Halst. 157; Adams *v.* Corriston, 7 Minn. 456; Brown *v.* Snell, 6 Flor. 744.

life for acts of waste done before the breach of the condition of the mortgage, even if done by a mere trespasser;[1] while a mortgagee in possession can only be reached in equity for acts of waste or trespass done by him upon the premises, unless he has restricted his power by some covenant.[2] But equity in such cases holds the mortgagee to a strict account for using the premises in a way inconsistent with the legitimate purposes of security.[3] And if after a judgment for redemption, and before possession under it has actually been delivered to the mortgagor, the mortgagee does acts injurious to the inheritance, the mortgagor, when he shall have regained possession, may have an action in the nature of waste for such injury.[4]

27. And although a mortgagee may not have a technical action of waste against the mortgagor in any case, he may have trespass *quare clausum* for any act done by him or by his authority, essentially impairing the inheritance, such as cutting timber, tearing down houses, fixtures, and the like,[5] although such fixtures may have been placed upon the premises by the mortgagor after the making of the mortgage.[6] So the mortgagee may have trespass against one who, by consent of the mortgagor, removes a house standing [*530] upon the mortgaged premises,[7] though * trespass will not lie against a mortgagor or his tenant for any acts of occupation done by either before entry made by the mortgagee, though after condition broken.[8] A mortgagee not in possession cannot have trespass against a third party for en-

[1] Fay *v.* Brewer, 3 Pick. 203.

[2] Furbush *v.* Goodwin, 9 Fost. (N. H.) 321; Chellis *v.* Stearns, 2 Fost. (N. H.) 312; Smith *v.* Johns, 3 Gray, 517; Taylor *v.* Townsend, 8 Mass. 411; Irwin *v.* Davidson, 3 Ired. Eq. 311; Evans *v.* Thomas, Cro. Jac. 172.

[3] Shaeffer *v.* Chambers, 2 Halst. Ch. 548; Givens *v.* McCalmont, 4 Watts, 460.

[4] Taylor *v.* Townsend, 8 Mass. 411.

[5] Stowell *v.* Pike, 2 Greenl. 387; Smith *v.* Moore, 11 N. H. 55; Bussey *v.* Paige, 14 Me. 132; Sanders *v.* Reed, 12 N. H. 558; Smith *v.* Goodwin, 2 Greenl. 173; Frothingham *v.* McKusick, 24 Me. 403; Pettingill *v.* Evans, 5 N. H. 54; Page *v.* Robinson, 10 Cush. 99; Hagar *v.* Brainard, 44 Vt. 302.

[6] Burnside *v.* Twitchell, 43 N. H. 390.

[7] Cole *v.* Stewart, 11 Cush. 182; Wilmarth *v.* Bancroft, 10 Allen, 348.

[8] Mayo *v.* Fletcher, 14 Pick. 525. For what a mortgagor may do on the premises, see Hoskin *v.* Woodward, 45 Penn. 44.

tering upon the premises and cutting and removing the crops growing thereon.[1] But if he be in possession, he may have trespass against a stranger for entering upon the premises.[2] A third mortgagee not in possession, though he may not have trespass *qu. cl.* against a stranger for entering upon the premises, may have an action of tort against one for entering and tearing down buildings or fixtures upon the premises, nor could it be set up in defence that the mortgagor may sue for the same. His right would be subordinate to that of the mortgagee. Nor could it be set up that the prior mortgagees have a right to claim damages for the same, if they have done nothing to assert such a claim.[3] Nor will assumpsit lie for rent in such a case.[4] In Pennsylvania, a writ of *Estrepement* to stay waste by a mortgagor is provided by statute.[5] In Vermont, a mortgagee, after condition broken, may have an action on the case, in the nature of waste against the mortgagor in possession, for cutting timber and selling it; or he may have trover for the timber.[6] So in Maine, the property in such timber is in the mortgagee, who may have trover for the same.[7] And in Rhode Island, the mortgagee may have replevin against mortgagor in possession for wood or timber so cut upon the premises as to waste the same.[8] In New York, a mortgagee may have an action on the case against the mortgagor for an injury to the mortgage security.[9]

28. The most general and effectual remedy for a mortgagee against a mortgagor to protect the premises is by bringing in equity a bill for an injunction to stay waste; or, according to the rule in Arkansas, to have the property placed in the hands of a receiver,[10] and this remedy may be obtained

[1] Gooding *v.* Shea, 103 Mass. 360; Woodward *v.* Picket, 8 Gray, 617.

[2] Sparhawk *v.* Bagg, 16 Gray, 584.

[3] Gooding *v.* Shea, *sup.*; Cole *v.* Stewart, 11 Cush. 181.

[4] Mayo *v.* Fletcher, 14 Pick. 525. [5] Purdon, Dig. 8th ed. 336, §§ 3, 6.

[6] Langdon *v.* Paul, 22 Vt. 205.

[7] Gore *v.* Jenness, 19 Me. 53; Bussey *v.* Page, 14 Me. 132.

[8] Waterman *v.* Matteson, 4 R. I. 539. That trover will not lie in Connecticut and New York, Cooper *v.* Davis, 15 Conn. 556; Peterson *v.* Clark, 15 Johns. 205. See *contra*, Hitchman *v.* Walton, 4 M. & W. 409.

[9] Van Pelt *v.* McGraw, 4 Comst. 110; Lane *v.* Hitchcock, 14 Johns. 213; Gardner *v.* Heartt, 3 Denio, 232. See also Hitchman *v.* Walton, 4 M. & W. 409.

[10] Cooper *v.* Davis, 15 Conn. 556; Brady *v.* Waldron, 2 Johns. Ch. 148; Cap-

by any one who is collaterally liable for the mortgage debt.[1]

29. If the mortgagor make a lease of the premises [*531] subject * to the mortgage, and the mortgagee recognizes the tenant as such, he makes him his own tenant so far that he cannot treat him as a trespasser.[2] But the mortgagee may disavow such tenancy, and take possession and evict the tenant, who will not be entitled to emblements, inasmuch as the mortgagee is considered as entering under a paramount title.[3] So if the mortgagor himself be expelled by the mortgagee, he cannot claim emblements, though it was done without notice.[4] Where a mortgagee entered, after condition broken, upon premises which had been let by the mortgagor before making the mortgage, it was held that he might compel the lessee to pay him all subsequently accruing rent, as well as rent then due which had accrued subsequent to the making of the mortgage, although his entry might not be sufficiently formal to work a foreclosure.[5] So if a termor underlet and then mortgage his term, it operates as an assignment to the mortgagee of the rent accruing due from such sub-lessee, after the making of the mortgage.[6] But this does

ner *v.* Farmington Mining Co., 2 Green, Ch. 467; Salman *v.* Clagett, 3 Bland, 125; Murdock's case, 2 Bland, 461; Scott *v.* Wharton, 2 Hen. & M. 25; Brick *v.* Getsinger, 1 Halst. Ch. 391; Gray *v.* Baldwin, 8 Blackf. 164; Eden on Injunctions, 205; Hampton *v.* Hodges, 8 Ves. 105; Usborne *v.* Usborne, 1 Dick. 75; Robinson *v.* Litton, 3 Atk. 210; Farrant *v.* Lovel, Id. 723; Parsons *v.* Hughes, 12 Md. 1; Mooney *v.* Brinkley, 17 Ark. 340; Morrison *v.* Buckner, Hempst. (Ark.) 442; Bunker *v.* Locke, 15 Wis. 635; Ensign *v.* Colburn, 11 Paige, 503. See Cortelyeu *v.* Hathaway, 3 Stockt. 40, as to when a receiver will be appointed, and what will be his power.

[1] Johnson *v.* White, 11 Barb. 194.

[2] Tud. Cas. 11; Doe *v.* Hales, 7 Bing. 322.

[3] Coote, Mortg. 332, 333; Mayo *v.* Fletcher, 14 Pick. 525. *Contra*, Lane *v.* King, 8 Wend. 584. Lynde *v.* Rowe, 12 Allen, 101.

[4] Jones *v.* Thomas, 8 Blackf. 428; M'Call *v.* Lenox, 9 S. & R. 302; Doe *v.* Mace, 7 Black. 2. In Connecticut, whatever is severed from the freehold by the mortgagor, including emblements, becomes his own. Tobey *v.* Reed, 9 Conn. 216; Cooper *v.* Davis, 15 Conn. 556.

[5] Smith *v.* Shepherd, 15 Pick. 147; Stone *v.* Patterson, 19 Pick. 476; Welch *v.* Adams, 1 Met. 494; Pope *v.* Biggs, 9 B. & C. 245; Kimball *v.* Lockwood, 6 R. I. 139.

[6] Russell *v.* Allen, 2 Allen, 42.

not extend to rent due when the mortgage was made.[1] The mortgagee, in such cases, is regarded as assignee of the reversion.[2] It is not competent, however, for a mortgagee, who takes his mortgage subsequent to a lease by the mortgagor, to disturb the lessee's possession any more than the mortgagor himself could have done. And though he may compel the tenant to pay him rent, it is only such as falls due after his mortgage is made, and has not been paid to the mortgagor before notice of the mortgage, and the mortgagee's claim to have it paid to him.[3] And this extends to rents paid in advance, if the payment is made in good faith.[4]

* 30. At common law the mortgagee cannot recover [*532] rent of the mortgagor for the time he suffers him to retain possession of the premises, unless the mortgagor take a lease, which he may do, from the mortgagee, under which he can hold possession against the mortgagee.[5] Nor can a mortgagee, in Massachusetts, recover mesne profits of a mortgagor, after a judgment for possession, for the time anterior to the recovery of his judgment.[6] But if, having a judgment for possession upon his mortgage, the mortgagee sue a writ of entry at common law, he may recover judgment for mesne profits from the time of rendition of the prior judgment.[7] But where the mortgage is prior to the lease, and the mortgagee gives the lessee notice to pay him the rent, and then recovers judgment for possession in ejectment, he may recover the mesne profits accruing after such notice.[8] So, if land is leased while under a mortgage, the lessee may become liable

[1] Burden *v.* Thayer, 3 Met. 76.

[2] Moss *v.* Gallimore, Doug. 279; Mass. Hosp. Life Ins. Co. *v.* Wilson, 10 Met. 126; Baldwin *v.* Walker, 21 Conn. 168; Babcock *v.* Kennedy, 1 Vt. 457; Coker *v.* Pearsall, 6 Ala. 542; Smith *v.* Taylor, 9 Ala. 633; 1 Smith, Lead. Cas. 2d Am. ed. 310; McKircher *v.* Hawley, 16 Johns. 289; Demarest *v.* Willard, 8 Cow. 206; Fitchburg Cotton Co. *v.* Melvin, 15 Mass. 268; Castleman *v.* Belt, 2 B. Mon. 157.

[3] See cases above; Myers *v.* White, 1 Rawle, 353; Weidner *v.* Foster, 2 Penn. 23.

[4] Henshaw *v.* Wells, 9 Humph. 568.

[5] Kunkle *v.* Wolfersberger, 6 Watts, 131.

[6] Coote, Mortg. 332; Wilder *v.* Houghton, 1 Pick. 87; Mayo *v.* Fletcher, 14 Pick. 525.

[7] Haven *v.* Adams, 8 Allen, 368.

[8] Bank of Washington *v.* Hupp, 10 Gratt. 23.

to the mortgagee for rent accruing due after entry made, or some equivalent act done by the mortgagee; but he is not liable before such entry, nor for rent due before it was made. The lessee, as to such rents, stands in the place of the mortgagor, and is liable to him.[1] And the law on the subject may be stated thus: If the mortgage is prior to the lease, there is no privity between the mortgagee and lessee; the lessee stands in the place of the mortgagor, and he would not be liable for rent until the mortgagee shall have taken possession of the premises.[2] Whether a demand and notice to pay rent shall be equivalent to making an entry is treated by the Massachusetts court as questionable,[3] though in the above case from Virginia it seems to have been held sufficient. But if the mortgagor or his tenant, under a lease made subsequent to the mortgage, refuse to yield possession, or pay rent if demanded, after the mortgagee's entry for condition broken, he may recover the mesne profits in a proper form of action for that purpose.[4]

31. In the case above supposed of a lease made after the making of a mortgage, if the lessee upon the mortgagee's making an entry for condition broken, or some act equivalent thereto, pay rent to the mortgagee, it creates the relation of landlord and tenant between them.[5] But if the lessee [*533] refuse to * recognize that relation, and will not pay rent to the mortgagee, his only remedy against the tenant is by an action of ejectment.[6] From what has been said,

[1] Morse *v.* Goddard, 13 Met. 177; Mass. Hosp. Life Ins. Co. *v.* Wilson, 10 Met. 126; Mayo *v.* Fletcher, 14 Pick. 525; Watts *v.* Coffin, 11 Johns. 495; McKircher *v.* Hawley, 16 Johns. 289; Peters *v.* Elkins, 14 Ohio, 344; Pope *v.* Biggs, 9 B. & C. 245; Kimball *v.* Lockwood, 6 R. I. 138; Syracuse City Bank *v.* Tallman, 31 Barb. 200.

[2] Russell *v.* Allen, 2 Allen, 44; Morse *v.* Goddard, 13 Met. 380; Smith *v.* Shepard, 15 Pick. 147; Kimball *v.* Lockwood, 6 R. I. 139; Syracuse City Bank *v.* Tallman, 31 Barb. 207. See note to Trent *v.* Hunt, 9 Exch. 24, Am. ed., for cases collected. Mass. Hosp. Life Ins. Co. *v.* Wilson, 10 Met. 126.

[3] Field *v.* Swan, 10 Met. 112. In Evans *v.* Elliot, 9 A. & E. 342, it is held that mere notice and demand of rent is not sufficient to entitle the mortgagee to hold the mortgagor's lessee as his tenant.

[4] Northampton Mills *v.* Ames, 8 Met. 1; Hill *v.* Jordan, 30 Me. 367; Turner *v.* Cameron, 5 Exch. 932; Litchfield *v.* Ready, Id. 939.

[5] Doe *v.* Barton, 11 A. & E. 307, 315; Coote, Mortg. 347.

[6] Partington *v.* Woodcock, 6 A. & E. 690.

it must be obvious that no lease that will be indefeasible can be made of an estate which has been previously mortgaged, unless the mortgagor and mortgagee both join, or at least concur, in its execution. If made by the mortgagor alone, the mortgagee may enter and defeat it. If made by the mortgagee alone, a redemption of the estate by the mortgagor will defeat the mortgagee's lease. And in such a case, if the mortgagee intend to avail himself of the rent, he must have the covenant for its payment made to him. If it is made to the mortgagor, the mortgagee cannot sue upon it.[1] A mortgagee may take a lease from the mortgagor, and covenant to pay him rent until condition broken; and if he do, he will be bound by his covenant, and not be admitted to set up his mortgage against the lease. But if, being in possession as lessee, he take a mortgage of the premises, he may elect whether to hold under his lease or his mortgage.[2] But under the system of New York, where a lessor mortgaged his estate to a third person, and then, before the mortgage-debt fell due, assigned the rent for a series of years, of which the mortgagee had notice, it was held, in an action to foreclose the mortgage, that the assignee of the rent might claim it between the time when the mortgage-debt fell due and the appointment of a receiver in the suit for foreclosure, although the mortgagor was insolvent, and the mortgaged premises were an inadequate security for the mortgage-debt.[3]

32. Before foreclosure, the wife of a mortgagee cannot claim dower in the mortgaged premises,[4] nor is his estate liable to be levied upon for his debts, even though the condition may have been broken.[5]

[1] Hungerford *v.* Clay, 9 Mod. 1; Willard *v.* Harvey, 5 N. H. 252; 1 Smith's Lead. Cas. 5th Am. ed. 697. Mr. Coventry, in a note to Powell, Mortg. 177, points out the form which parties should adopt in such cases to secure the rights of mortgagor and mortgagee.

[2] Newall *v.* Wright, 3 Mass. 138; Wood *v.* Felton, 9 Pick. 175; Johnson *v.* Muzzy, 42 Vt. 708; Shields *v.* Lozear, 34 N. J. 496.

[3] Syracuse City Bank *v.* Tallman, 31 Barb. 200; Zeiter *v.* Bowman, 6 Barb. 133.

[4] Powell, Mortg. 7, n. D.; Ark. Dig. Stat. 1858, p. 451; Ill. Comp. Stat. 1857, vol. 1, p. 155; 1874, c. 41, § 6; Mich. Comp. Stat. 1857, c. 89, §§ 3–6; 1871, c. 151, §§ 3–6; New York Rev. Stat. 1852, vol. 2, p. 150; 1863, vol. 1, p. 692.

[5] Blanchard *v.* Colburn, 16 Mass. 345; Eaton *v.* Whiting, 3 Pick. 484; Hun-

33. How far a devise of lands, tenements, and hereditaments will pass mortgages, has been differently held by different courts. The following authorities sustain what seems to be the better doctrine, that it will pass mortgages held by the devisor, unless a contrary intention can be collected from the language of the will.[1] So it has been held that a [*534] devise of one's mortgages * will pass the lands mortgaged, though a devise of securities for money will or will not pass mortgaged estates according to the language and intent of the testator.[2] And it seems to be well settled, that if a testator, after making his will devising his lands, &c., forecloses a mortgage which he held at the making of his will, it will so far change the nature of his interest in the premises, as to place them in the category of after-acquired real estate, which, at common law indeed, would not pass by such a will. To work this change, there must be an actual foreclosure; merely entering and taking possession will not have that effect. The foreclosure becomes, in a measure, a new purchase.[3]

ter *v.* Hunter, Walk. (Miss.) 194; Huntington *v.* Smith, 4 Conn. 235; Smith *v.* People's Bank, 24 Me. 185; Rickert *v.* Madeira, 1 Rawle, 325; Jackson *v.* Willard, 4 Johns. 41; Trapnall *v.* State Bank, 18 Ark. 53; Runyan *v.* Mersereau, 11 Johns. 534; Glass *v.* Ellison, 9 N. H. 69; Buck *v.* Sanders, 1 Dana, 187; Whiting *v.* Beebe, 7 Eng. (Ark.) 581; Pettit *v.* Johnson, 16 Ark. 65; Hill *v.* West, 8 Ohio, 222; McGan *v.* Marshall, 7 Humph. 121; Thornton *v.* Wood, 42 Me. 282; Marsh *v.* Austin, 1 Allen, 240; Symes *v.* Hill, Ib. 318; Brown *v.* Bates, 55 Me. 522. But formerly held otherwise in Massachusetts. Hooton *v.* Grout, Quincy, 343.

[1] Byth. Jarman, Conv. 634, note, and 638; Jackson *v.* De Lancey, 13 Johns. 553–559; Galliers *v.* Moss, 9 B. & C. 267; Co. Lit. 205 a, note 96; Braybroke *v.* Inskip, 8 Ves. 417, n. But in the following cases the courts held, that a general devise of lands would not pass the devisor's mortgages. Attorney-General *v.* Vigor, 8 Ves. 276; Casborne *v.* Scarfe, 1 Atk. 605; Winn *v.* Littleton 1 Vern. 8; Strode *v.* Russell, 2 Vern. 625; Wilkins *v.* French, 20 Me. 111, favors the same idea.

[2] Winn *v.* Littleton, 1 Vern. 4, Ruthley's ed. n.; Crips *v.* Grysil, Cro. Car. 37; 2 Crabb, Real Prop. 882; Galliers *v.* Moss, 9 B. & C. 267; Powell, Mortg. 267, note, that such a devise does in equity pass the mortgage.

[3] Casborne *v.* Scarfe, 1 Atk. 606; Brigham *v.* Winchester, 1 Met. 360; Strode *v.* Russell, 2 Vern. 625; Ballard *v.* Carter, 5 Pick. 112; Fay *v.* Cheney, 14 Pick. 399. By statute now, a devise will pass after-acquired real estate. Mass. Gen. Stat. 1860, c. 92, § 4. But if devisor sell lands which he has devised in his will, and take back a mortgage for the purchase-money, he thereby revokes his devise; the mortgage does not pass by the will. Beck *v.* McGillis, 9 Barb. 35.

34. At common law, if the mortgagee dies, his legal estate in the mortgaged premises descends to his heirs. But they will in equity be held as trustees for the executor or administrator of the mortgagee, since the debt thereby secured goes into the executor's hands as personal assets. Equity, however, gives the same direction to the mortgage as to the debt, and both go to the executor,[1] and an heir cannot release a mortgage.[2] So where the heirs of a mortgagee conveyed the premises before the mortgage was foreclosed, it was held not to operate as an assignment of the mortgage, whereas a quitclaim by the administrator of the mortgagee would be an assignment of the mortgage. And an executor or administrator may assign a mortgage.[3] And this is adopted as the statute rule in many of the States,[4] where, accordingly, the executor or * administrator of the mortgagee may [*535] recover possession of the land, and hold it to be administered and accounted for as personal assets. And this accords with the law as it stands in Massachusetts.[5] It was accordingly held that an entry and possession taken for purposes of foreclosure by the *heirs* of the mortgagee had no effect to bar the redemption of the estate by the mortgagor, though held for eight years. It was held, moreover, that by such possession the heirs were disseisors of the personal rep-

[1] Demarest *v.* Wynkoop, 3 Johns. Ch. 145; Jackson *v.* De Lancey, 11 Johns. 365, s. c. 13 Johns. 535; Kinna *v.* Smith, 2 Green, Ch. 14; Barnes *v.* Lee, 1 Bibb, 526; 1 Smith, Lead. Cas. 5th Am. ed. 669; Co. Lit. 205 a, n. 96; Smith *v.* Dyer, 16 Mass. 23; Dewey *v.* Van Deusen, 4 Pick. 19; Wms. Real Prop. 331; Green *v.* Hunt, Cooke (Tenn.), 344; Winn *v.* Littleton, 1 Vern. 4, n.; Wilkins *v.* French, 20 Me. 111; Chase *v.* Lockerman, 11 Gill & J. 185; Dexter *v.* Arnold, 1 Sumn. 109, where it is held that it is ordinarily necessary to make the heir of a mortgagee party to a bill to redeem the mortgage, though held otherwise in Kinna *v.* Smith, 2 Green, Ch. 14; White *v.* Rittenmyer, 30 Iowa, 272.

[2] Taft *v.* Stevens, 3 Gray, 504.

[3] Douglass *v.* Duren, 51 Me. 121; Burt *v.* Ricker, 6 Allen, 78.

[4] Rhode Island, Rev. Stat. 1857, c. 157, § 15; 1872, c. 174; Maine, Rev. Stat. 1857, c. 90, § 10; 1871, c. 90, § 10; Michigan, Comp. Stat. 1857, c. 95, § 12; 1871, c. 157, § 12; Vermont, Comp. Stat. 1850, p. 344, § 29; 1862, Append. p. 393, § 27; Ohio, Rev. Stat. 1854, c. 44, § 66; 1860, vol. 1, c. 43, § 67; Burton *v.* Hintrager, 18 Iowa, 351.

[5] Smith *v.* Dyer, 16 Mass. 18; Hathaway *v.* Valentine, 14 Mass. 501; Gen. Stat. 1860, c. 96, §§ 9, 10, 11; Marsh *v.* Austin, 1 Allen, 239; Steel *v.* Steel, 4 Allen, 417.

resentatives of the mortgagee, and accountable to them for the mesne rents and profits. And an administrator having been appointed on the estate of the mortgagee, the heirs were held accountable to him for the rents as executors in their own wrong, and he would be obliged to allow these to the mortgagor as having been received towards the mortgage-debt.[1] And so far has this doctrine been established, that where the mortgagee obtained conditional judgment for possession in order to foreclose the mortgage, and a stranger entered after his death, his administrator, it was held, might maintain a writ of entry against the stranger as a disseisor.[2] So an administrator of a mortgagee, after he had obtained judgment for foreclosure and possession upon a mortgage held by his intestate, was held entitled to maintain trespass against an heir of the mortgagee for entering upon the premises.[3] In order to administer lands held by executors and administrators in mortgage at common law, under the Revised Statutes of Massachusetts, a license for their sale had to be first obtained. But now, by statute, they may be sold and administered before foreclosure, like personal estate.[4] And one of two executors may effectually assign a mortgage.[5] If, therefore, the mortgagor would redeem the estate after the death of the mortgagee, the money is to be paid to the executor or administrator, and not to the heir.[6] *

35. A mortgage is often made to several persons sometimes to secure two separate debts, and sometimes to secure one or more joint debts due to the mortgagees. If made to secure separate debts, the interests of the mortgagees are [*536] several, and not *joint, and the remedy for each is several. But the amount of the respective interests in the mortgaged property is, *pro rata*, according to the re-

* Note. — This doctrine, that a mortgage is personal assets, and, as such, goes to the executor, has been sustained since the time of Lord Keeper Finch, 28 Charles II., in Thornbrough *v.* Baker, 1 Ch. Cas. 283; Fisk *v.* Fisk, Prec. Chan. 11; Tabor *v.* Grover, 2 Vern. 367; Casborne *v.* Scarfe, 1 Atk. 605.

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[1] Haskins *v.* Hawkes, 108 Mass. 379, 381.

[2] Richardson *v.* Hildreth, 8 Cush. 225. [3] Palmer *v.* Stevens, 11 Cush. 147.

[4] Blair, Appellant, 13 Met. 126; Gen. Stat. c. 98, § 5.

[5] George *v.* Baker, 3 Allen, 326. [6] 2 Crabb, Real Prop. 830.

spective amounts of their debts.[1] If the debt be a joint one, the mortgagees are joint-tenants of the mortgage estate, with the right of survivorship, even in States where, by statute, a joint ownership of lands creates a tenancy in common. And a release by one of the mortgagees, in such a case, of the debt, is a discharge of the mortgage upon the land.[2] But as soon as the mortgage has been foreclosed, and the legal estate made absolute, it is converted into a tenancy in common between the owners thereof.[3] As a consequence of the above propositions, if one of two joint-mortgagees die before foreclosure of the mortgage, the survivor may bring an action to foreclose the same.[4] But if the debts are distinct, the survivor of the mortgagees cannot sustain an action in his own name to foreclose the mortgage for the debt due the deceased.[5] But if there be a joint-mortgage made to two to secure a debt due to one of them, the legal estate vests in them as tenants in common, the one having no interest in the mortgage-debt being a trustee of the estate for the benefit of him who owns the debt.[6]

36. If two several owners of distinct parcels mortgage them to secure a joint-debt, it *prima facie* charges these lands, so far as respects the mortgagors, equally each for a moiety of the debt, and no agreement otherwise between the mortgagors will affect a subsequent purchaser without notice.[7]

37. Though somewhat has been said of the necessity of recording mortgages, it is proper to repeat that successive mortgages, duly registered, take effect and avail as security in favor of the successive holders, according to their priority of registration. This is but carrying out the doctrine of the effect of * notice in equity, the registration being [*537] constructive notice to all persons affected by it.[8] And

[1] Burnett *v.* Pratt, 22 Pick. 556; Donnels *v.* Edwards, 2 Pick. 617; Gilson *v.* Gilson, 2 Allen, 117.

[2] Appleton *v.* Boyd, 7 Mass. 131; Webster *v.* Vandeventer, 6 Gray, 428.

[3] Goodwin *v.* Richardson, 11 Mass. 469; Johnson *v.* Brown, 11 Fost. (N. H.) 405; Deloney *v.* Hutcheson, 2 Rand. 183; Randall *v.* Phillips, 3 Mason, 378; Tyler *v.* Taylor, 8 Barb. 585; Rigden *v.* Vallier, 2 Ves. Sen. 258.

[4] Williams *v.* Hilton, 35 Me. 547; Appleton *v.* Boyd, 7 Mass. 131.

[5] Burnett *v.* Pratt, 22 Pick. 556.

[6] Root *v.* Bancroft, 10 Met. 44.

[7] Hoyt *v.* Doughty, 4 Sandf. 462.

[8] Coote, Mortg. 384, note Am. cases; Grant *v.* Bissett, 1 Caines, Cas. 112; Doe *v.* Bank of Cleveland, 3 McLean, 140.

consistently with this doctrine, such registration is only notice of the amount of an existing mortgage, so far as the record itself shows it. Thus, where the mortgage was to secure the sum of $3,000, and the record was $300, it was held to be notice, or to give precedence only for $300.[1] But in Alabama, where the mortgage covered two sums, but the register in recording it omitted one of them, it was held not to impair the mortgagee's security for both sums.[2] So where, as in Minnesota, the law requires two witnesses to a mortgage-deed to give it validity, and the recorder omitted the name of one of them in recording a mortgage-deed, it was held to be no notice to others of such a mortgage, because, as appeared by the record, the deed was of no validity, and a subsequent deed duly recorded, taken by one not having actual notice of the prior deed, took precedence of such prior deed, though in fact it had been properly executed.[3] But where two mortgages are made in pursuance of the same contract or transaction to two parties, neither will gain any precedence of the other by any priority of record of his deed. Their equities would still be equal.[4] The statutory provisions of the several States in respect to recording mortgages are generally the same as relate to absolute deeds, though there are special provisions as to mortgages in some of the States. In Alabama and in Texas, mortgages given to secure debts created at the date of the deed are to be recorded within three months. Other mortgages become liens from the time of registration.[5] In Arkansas they become liens from the time of being filed in the register's office.[6] In Delaware, from the time of recording.[7] In North Carolina they are good against creditors only from the time of registration.[8] In Pennsylvania they constitute no lien until recorded, except for the purchase-money. Their priority is in the order of record.[9] But if two mortgages are

[1] Frost *v.* Beeckman, 1 Johns. Ch. 288, s. c. 18 Johns. 544.

[2] Mims *v.* Mims, 35 Ala. 25. [3] Barret *v.* Shaubhut, 5 Minn. 323.

[4] Daggett *v.* Rankin, 31 Cal. 327.

[5] Code, 1852, §§ 1287, 1288; 1867, §§ 1557, 1558; Oldham & White, Dig. 1859, p. 381; Paschal's Dig. 1866, p. 835.

[6] Dig. 1858, p. 799; Jacoway *v.* Gault, 20 Ark. 190.

[7] Code, 1852, c. 81, § 19; 1874, c. 83, § 19.

[8] Rev. Code, 1854, c. 37, § 22; Battle's Revis. 1873, c. 35, § 12; Davidson *v.* Cowan, 1 Dev. Eq. 470.

[9] Purdon, Dig. 1861, p. 324; 1872, vol. 1, p. 478.

made to secure purchase-money, and are recorded on the same day within the sixty days from their date, they are treated as contemporaneous, and neither has the precedence of the other.[1] In Indiana, the time given for recording is sixty days. But if a deed is recorded after that, the record takes effect as a notice from the time it is made.[2] In Michigan, a second mortgage, in order to take priority of a former one by being first recorded, must have been made for value actually paid. A mere promise to pay a third person would not be sufficient.[3] The same rule prevails in Ohio, so far as others than the parties to the mortgage are concerned, although the second mortgagee knew of the prior one when he received it.[4] So, in that State, a mortgage requires two witnesses to give it validity; and if executed with a less number, a subsequent deed, properly executed, will take precedence of it, though taken with the knowledge of such prior incomplete deed.[5] In Pennsylvania, a judgment takes precedence of an unrecorded mortgage.[6] But it is competent for two mortgagees, by agreement, to give a second mortgage the precedence of a prior one, so as to bind their assignees, if it be done by a proper instrument put upon record.[7] As between the parties themselves, a mortgage is good without registration.[8] So it is against subsequent purchasers with notice, if clearly proved.[9] An unrecorded mortgage is good against the mortgagor, his heirs and grantees, or against mortgagees with notice, and also against voluntary assignees in favor of creditors. But it would not

[1] Dungan *v.* Am. Life Ins. Co., 52 Penn. 256.

[2] Meni *v.* Rathbone, 21 Ind. 458.

[3] Stone *v.* Welling, 14 Mich. 525; Thomas *v.* Stone, Walker, Ch. 117; Cory *v.* White, 52 N. Y. 138.

[4] Bloom *v.* Noggle, 4 Ohio St. 55; Standell *v.* Roberts, 13 Ohio, 148; Holliday *v.* Franklin Bank, 16 Ohio, 536; Spader *v.* Lawler, 17 Ohio, 379.

[5] White *v.* Denman, 16 Ohio, 59. [6] Semple *v.* Burd, 7 S. & R. 290.

[7] Clason *v.* Shepherd, 6 Wis. 369, 374.

[8] Andrews *v.* Burns, 11 Ala. 691; Salmon *v.* Clagett, 3 Bland. 126; Fosdick *v.* Barr, 3 Ohio St. 471; Leggett *v.* Bullock, Busbee (N. C.) 283; Howard Mut. &c. Association *v.* McIntyre, 3 Allen, 571.

[9] Copeland *v.* Copeland, 28 Me. 525; Solms *v.* McCullock, 5 Penn. St. 473; Dearing *v.* Watkins, 16 Ala. 20; Sparks *v.* State Bank, 7 Blackf. 469; Woodworth *v.* Guzman, 1 Cal. 203; Gen. Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517; Harris *v.* Norton, 16 Barb. 264.

avail against the purchasers at a sale made by order of the Orphans' Court to satisfy the debtors of the mortgagor.[1] And a priority of registration gives no precedence of right against a prior mortgage, of which the junior mortgagee who obtains the registration had notice when he took his mortgage.[2] An unrecorded mortgage is a lien as against an assignee [*538] of the mortgagor in trust for the benefit of * creditors, such assignee being regarded neither as creditor nor purchaser for value.[3] Where a mortgage, and a subsequent deed, by the same grantor, of the same estate, were made to different persons in Pennsylvania, who failed to have them recorded within six months, and then the mortgage was first recorded, it was held to take precedence of the deed, though the grantee in the latter was actually in possession under it.[4] Subsequent to the execution of a mortgage, the premises covered by it were sold by the mortgagor in separate parcels to different purchasers, who had no notice of the mortgage, and one of those deeds was prior in date to another which was first recorded. It was held, that, in a proceeding under the mortgage, the one holding under the first deed took precedence of the second, though the latter was first recorded.[5] In establishing the fact of notice of a prior incumbrance, the mortgagor is himself a competent witness.[6] It is usually provided by statute, that, in order to the registration of a conveyance, the deed should be acknowledged before some magistrate or court, and a certificate thereof entered upon the deed. And if such deed is registered without such an acknowledgment, the registration will not be constructive notice to any

[1] Nice's Appeal, 54 Penn. St. 200, 202.

[2] Gen. Ins. Co. *v.* U. Ins. Co., 18 Md. 517; 1 Story, Eq. Jur. § 421; Dorrow *v.* Kelley, 1 Dall. 142; Wyatt *v.* Stewart, 34 Ala. 716; Bell *v.* Thomas, 2 Iowa, 384.

[3] Mellon's Appeal, 32 Penn. St. 121.

[4] Sonder *v.* Morrow, 33 Penn. St. 83.

[5] Ellison *v.* Pecare, 29 Barb. 333. This was so held because the statute of registration did not apply to mere equities. The precedence was effected by a decree that the parcel conveyed by the second deed should be first sold for payment of the mortgage-debt, and its proceeds applied before the first sold parcel should be sold at all.

[6] Van Wagenen *v.* Hoppin, 4 Halst. Ch. 684.

one.[1] And the proposition is a general one, that an irregular registration of a deed is no notice to others of the existence of such deed.[2] But an omission of the register to note the time of receiving the deed for record,[3] or to enter it in the index or alphabet,[4] will not invalidate the effect of the registration. But in Iowa, the law requires a filing of a deed in the registry, a copying upon the records, and an indexing it; and an omission to do either of these will fail to render the registration of an instrument constructive notice to third parties.[5] In Pennsylvania the court hold that the record of a deed is not constructive notice to third parties, unless it is duly indexed. "The index is an indispensable part of the recording, and without it the record affects no party with notice."[6] But in Missouri it is held that a deed filed and recorded in the recorder's office is notice to subsequent purchasers, notwithstanding the failure of the officer to index it.[7] A deed noted for registration, though not actually recorded till subsequently to a prior deed which was received for record after the second deed, will take precedence of such prior deed.[8]

38. The doctrine of *lis pendens*, being a notice to parties interested, applies to the case of a mortgage upon which a suit for foreclosure is pending. Service made in such suit is notice of its having been begun.[9]

*39. Notwithstanding the effect given to a registra- [*539] tion of a conveyance in the way of notice, the registration of an assignment of a mortgage has been held not to

[1] Work *v.* Harper, 24 Miss. 517; White *v.* Denman, 1 Ohio St. 110; Blood *v.* Blood, 23 Pick. 80.

[2] Rushin *v.* Shields, 11 Geo. 636; Dewitt *v.* Moulton, 17 Me. 418; Farmers' Bank *v.* Bronson, 14 Mich. 369.

[3] McLarren *v.* Thompson, 40 Me. 284; Handley *v.* Howe, 22 Me. 116. See Barney *v.* McCarty, 15 Iowa, 521.

[4] Curtis *v.* Lyman, 24 Vt. 338.

[5] Miller *v.* Bradford, 12 Iowa, 14; Barney *v.* McCarty, 15 Iowa, 510; Whalley *v.* Small, 25 Iowa, 184.

[6] Speer *v.* Evans, 47 Penn. St. 144. [7] Bishop *v.* Schneider, 46 Mo. 472.

[8] Ruggles *v.* Williams, 1 Head, 141. See *post*, vol. 3, p. *591.

[9] Hoole *v.* Attorney-General, 22 Ala. 190. See Newman *v.* Chapman, 2 Rand. 93; Center *v.* P. & M. Bank, 22 Ala. 743; McPherson *v.* Housel, 13 N. J. 299. See Fisher, Mortg. 336; Haven *v.* Adams, 8 Allen, 367; Jackson *v.* Warren, 32 Ill. 340. Any person purchasing the subject-matter of a suit *lite pendente* is bound by the judgment. Cole *v.* Lake Co., 54 N. H. 272.

be of itself constructive notice to the mortgagor of its having been made, even where the law requires such assignment to be recorded.[1] And a payment made to a mortgagee without notice of an assignment will be a good payment.[2] In Michigan an exception is made if the mortgage-note be negotiable, and is negotiated by the mortgagee before it is due.[3] But it would be notice as against subsequent assignees of the mortgage ;[4] and such assignee should cause his assignment to be recorded for his own protection.[5] The whole object of the registration acts is to protect subsequent purchasers and incumbrancers against previous deeds and mortgages, &c., which are not recorded. The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor ; though the question, how far the case of a mortgage to secure future advances forms an exception to this rule, will be considered hereafter.[6] In some of the States it has been held, that, where a mortgage has been assigned for a valuable consideration, even a *bona fide* purchaser, without notice, cannot object to its validity and effect, though not recorded ;[7] which is in accordance with the idea that it is a mere chose in action, transferable by delivery or parol ; and, of course, whoever takes an estate upon which there is a recorded outstanding mortgage is put to inquire in

[1] Wolcott *v.* Sullivan, 1 Edw. Ch. 399 ; Reed *v.* Marble, 10 Paige, Ch. 409 ; New York, Rev. Stat. 1852, vol. 2, p. 172 ; Michigan, Comp. St. 1857, c. 88, § 33, 1871, c. 150, § 33 ; Maryland, Laws, Dorsey's ed. vol. 3, p. 2332 ; Code, 1860, vol. 1, p. 137, § 32 ; Pickett *v.* Barron, 29 Barb. 505 ; Mitchell *v.* Burnham, 44 Me. 302 ; *post*, vol. 3, p. *591 ; Williams *v.* Sorrell, 4 Ves. Jr. 389.

[2] Mitchell *v.* Burnham, 44 Me. 302 ; James *v.* Johnson, 6 Johns. Ch. 417 ; Bank *v.* Anderson, 14 Iowa, 544 ; Johnson *v.* Carpenter, 7 Minn. 176.

[3] Jones *v* Smith, 22 Mich. 365.

[4] New York Life Ins. Co. *v.* Smith, 2 Barb. 82.

[5] Clark *v.* Jenkins, 5 Pick. 280 ; Williams *v.* Birbeck, 1 Hoff. Ch. 359.

[6] Stuyvesant *v.* Hall, 2 Barb. Ch. 158 ; 4 Kent, Com. 174, note ; Bell *v.* Fleming, 1 Beasley (N. J.) 16 ; Blair *v.* Ward, 2 Stockt. Ch. 126 ; *post*, p. *542.

[7] Wilson *v.* Kimball, 7 Fost. (N. H.) 300 ; Cicotte *v.* Gagnier, 2 Mich. 381. See Mott *v.* Clark, 9 Penn. St. 399 ; see St. of Penn. 1849, p. 527 ; 1872, vol. 1, p. 471, that assignments will be notice if recorded. In Wisconsin, the recording an assignment of a mortgage is not deemed notice thereof to the mortgagor, his heirs or representatives, so as to invalidate a payment by them or either of them to the mortgagee. Rev. St. 1858, c. 86, p. 542.

whose hands the mortgage title is, without any further notice. If a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to one who has no notice thereof, and the latter records his assignment before the first mortgage is recorded, he thereby acquires a precedence over the first mortgagee. So if a junior mortgagee in a recorded mortgage, without notice of a prior unrecorded mortgage, assign to one who has notice of such prior mortgage, the assignee will have preference over the last-mentioned mortgage, since he has the rights in that case of his assignor.[1]

40. In some of the States a judgment forms a lien upon the real estate of the debtor, and in some of these a docketed judgment is preferred to a prior unregistered mortgage.[2] And if *the priority cannot be determined, [*540] they will be satisfied *pro rata*.[3] In others, a mortgage unrecorded will take priority of a subsequent judgment docketed. But if the sheriff proceeds to sell under such judgment to a *bona fide* purchaser before the mortgage is registered, the purchaser will have the rights of a purchaser, and be protected against such mortgage.[4]

41. In England there is a doctrine in relation to mortgages, by which, if there were, for instance, three successive mortgages, without notice, upon the same estate, to three different persons, and the third acquires the first mortgage by assignment, he may hold the estate against the second until he shall have paid both the first and the third. This is called "tacking" of mortgages, and rests upon the idea that the equities of the parties are all equal, and the first, being in possession, shall not be obliged to give up his legal right of possession till his whole charge upon the estate is satisfied.[5] So, where

[1] Fort *v.* Burch, 5 Denio, 187. See La Farge Ins. Co. *v.* Bell, 22 Barb. 54, upon what the priority among several mortgagees depends.

[2] Friedley *v.* Hamilton, 17 S. & R. 70; Davidson *v.* Cowan, 1 Dev. Eq. 470; Sturgess *v.* Cleveland, 3 McLean, 140; Uhlin *v.* Hutchinson, 23 Penn. St. 110.

[3] Hendrickson's Appeal, 24 Penn. St. 363. See Sigourney *v.* Eaton, 14 Pick. 414, that two simultaneous attaching creditors will share *equally* in levying upon real estate.

[4] Jackson *v.* Dubois, 4 Johns. 216; Schmidt *v.* Hoyt, 1 Edw. Ch. 652; Hampton *v.* Levy, 1 McCord, Ch. 107.

[5] Wms. Real Prop. 363.

a mortgagee makes a further advance, and has no notice of any claim adverse to his title, being regarded as a purchaser for value, he is entitled to tack the further advance to the original mortgage.[1] But in this country, this doctrine is wholly superseded by the principle of registration, whereby the record of a prior mortgage is constructive notice to all parties of its existence. If it is not recorded, and the second has no notice of it, in fact, his own takes precedence of the prior one.[2] In Pennsylvania it is expressly held that a mortgage is security only for the specific debt for which it was given;[3] while in other of the States the courts have allowed a mortgagee to hold the premises against a mortgagor, his heir or devisee, until all subsequent advances made [*541] by the * mortgagee to the mortgagor shall have been paid, in case such mortgagor, his heir or devisee, shall seek to redeem the mortgaged premises. But this does not apply as to purchasers or incumbrancers whose rights arise after the making of such mortgage; nor is it allowed to the mortgagee if he undertakes to enforce his mortgage by foreclosure.[4]

41 *a*. Although the English doctrine of tacking does not apply in Massachusetts, the courts sometimes virtually extend the lien of a mortgage beyond securing the debt originally contemplated by the parties, when the rights of third persons are not impaired, by refusing relief to the mortgagor in redeeming his estate, unless he pays such additional sums. Thus, though after a mortgage has been satisfied it cannot be made a security for a new debt by an oral agreement

[1] Young *v.* Young, L. R. 3 Eq. Cas. 805.

[2] 4 Dane, Abr. 171; Grant *v.* Bissett, 1 Caines, Cas. 112; Coote, Mortg. Am. ed. 386, n.; M'Kinstry *v.* Merwin, 3 Johns. Ch. 466; Burnet *v.* Denniston, 5 Johns. Ch. 35; Brigden *v.* Carhart, 1 Hopk. Ch. 231; Osborn *v.* Carr, 12 Conn. 195; Brazee *v.* Lancaster Bank, 14 Ohio, 318; Anderson *v.* Neff, 11 S. & R. 208; Loring *v.* Cooke, 3 Pick. 48; Green *v.* Tanner, 8 Met. 411; Marsh *v.* Lee, 1 White & Tudor, Lead. Cas. 406, Am. ed. See also Averill *v.* Guthrie, 8 Dana, 82; Thompson *v.* Chandler, 7 Me. 381; Siter *v.* McClanachan, 2 Gratt. 305.

[3] Dorrow *v.* Kelley, 1 Dall. 142; Anderson *v.* Neff, 11 S. & R. 208; Thomas' Appeal, 30 Penn. St. 378.

[4] Lee *v.* Stone, 5 Gill & J. 611; Coombs *v.* Jordan, 3 Bland, 284; Downing *v.* Palmateer, 1 Mon. 64; Siter *v.* McClanachan, 2 Gratt. 280; Walling *v.* Aiken, 1 McMullan, Eq. 1.

between the parties, yet if such agreement has been made, and money advanced by the mortgagee to the mortgagor upon the strength of it, the court will not aid the mortgagor or any one claiming under him, with notice, to cause the mortgage to be cancelled or released until such additional advances shall have been repaid.[1] So where, after a breach of the condition of a mortgage, the mortgagee advances money to the mortgagor under an oral agreement that the mortgage should stand as security therefor, the court will not allow the mortgagor, or any one having no better equity than he, to redeem the estate without allowing and paying such advancements.[2]

42. It is, however, of frequent occurrence, that a mortgage provides for future advances or liabilities, and is so made as to cover these; and such a mortgage may be valid, if made *bona fide*, and so framed as to disclose the purposes of the mortgage, together with the means of ascertaining the amount of such advances or liabilities, so that creditors, or after-purchasers, or mortgagees, may know to what the estate is subject when they purchase.[3] And these advances may be to be made to the mortgagor or third persons.[4] The *bona fides* in these cases is a question for the jury. But the consideration expressed is no test of the validity of such a mortgage, if made for future advances; nor is it necessary that the deed should stipulate as to the amount of such advances.[5] And

[1] Joslyn *v.* Wyman, 5 Allen, 62. [2] Stone *v.* Lane, 10 Allen, 74.

[3] United States *v.* Hooe, 3 Cranch, 73; Conard *v.* Atlantic Ins. Co., 1 Pet. 448; Badlam *v.* Tucker, 1 Pick. 389; St. Andrew's Church *v.* Tompkins, 7 Johns. Ch. 14; Hubbard *v.* Savage, 8 Conn. 215; Crane *v.* Deming, 7 Conn. 387. In this case the advances were made after subsequent mortgages upon the same estate, but held to be secured by the prior mortgage. Shirras *v.* Caig, 7 Cranch, 34; Leeds *v.* Cameron, 3 Sumn. 488; Seaman *v.* Fleming, 7 Rich. Eq. (S. C.) 283; Collins *v.* Carlile, 13 Ill. 254; Commercial Bank *v.* Cunningham, 24 Pick. 270; Truscott *v.* King, 1 Seld. 147; Craig *v.* Tappin, 2 Sandf. Ch. 78; Shepard *v.* Shepard, 6 Conn. 37; Lewis *v.* De Forest, 20 Conn. 427; Handy *v.* Commercial Bank, 10 B. Mon. 98; Ketchum *v.* Jauncey, 23 Conn. 123; Goddard *v.* Sawyer, 9 Allen, 80; Adams *v.* Wheeler, 10 Pick. 199; Foster *v.* Reynolds, 38 Mo. 557; Youngs *v.* Wilson, 24 Barb. 510; Vanmeter *v.* Vanmeter, 3 Gratt. 148; Burdett *v.* Clay, 8 B. Mon. 287; Thomas *v.* Kelsey, 30 Barb. 268; Wilson *v.* Russell, 13 Md. 496, 536; Longwith *v.* Butler, 3 Gilm. 36; Bell *v.* Fleming, 1 Beasley (N. J.), 1, 16; Lawrence *v.* Tucker, 23 How. 14.

[4] Maffett *v.* Rynd, 69 Penn. St. 387.

[5] Miller *v.* Lockwood, 32 N. Y. 298, 299; McKinster *v.* Babcock, 26 N. Y. 378.

the liberality which courts of late extend toward advances made with a view of being covered by existing mortgages makes this limitation rather a nominal than a real one. It seems to be enough that the mortgage indicates the mode of ascertaining what sums it covers, although to do this recourse must be had to collateral proof by parol evidence. Thus it was held in Ohio to be sufficient that it could be shown by evidence what indebtedness was intended.[1] In another case, the condition of the mortgage was to secure the payment of moneys then due, or that might thereafter become due, from a third person to the mortgagee.[2] In New York, the deed in one case recited that it was contemplated to make loans and advances from time to time; and the condition was to pay "all such drafts and bills of exchange as may be discounted or advanced," without fixing any limit as to time or amount, and held to be good.[3] In Vermont, a condition in a mortgage to pay "all I now or may hereafter owe the mortgagee" is good, and the same rule is applied in Michigan.[4] If the amount limited in terms, in the mortgage, of the advances to be thereby secured, has been advanced, it would not be competent, as against a junior incumbrancer, to show by parol that it was intended to cover a further indebtedness.[5] So if the condition covers "debts accruing upon some written contract or agreement signed, &c." No debt not coming within this description can be held to be secured by the mortgage.[6] If given to indemnify for having signed *a* note, parol evidence is competent to show that *the* note produced was the one intended.[7] If the time within which the future advances are contemplated to be made is limited in the mortgage, any advances made afterwards will not be cov-

[1] Hurd *v.* Robinson, 11 Ohio St. 232.

[2] Kramer *v.* Farmers' & Mech. Bank, 15 Ohio, 253. See McDaniels *v.* Colvin, 16 Vt. 300; Seymour *v.* Darrow, 31 Vt. 122; Craig *v.* Tappin, 2 Sandf. Ch. 82.

[3] Robinson *v.* Williams, 22 N. Y. (8 Smith) 380; Youngs *v.* Wilson, 27 N. Y. 353.

[4] McDaniels *v.* Colvin, 16 Vt. 300; Seymour *v.* Darrow, 31 Vt. 133; Soule *v.* Albee, 31 Vt. 142; Michigan Ins. Co. *v.* Brown, 12 Am. Law. Reg. 46.

[5] Murrray *v.* Burney, 34 Barb. 336, 347; Bank of Utica *v.* Finch, 3 Barb. Ch. 294.

[6] Walker *v.* Paine, 31 Barb. 213.

[7] Goddard *v.* Sawyer, 9 Allen, 80; Bell *v.* Fleming, 1 Beasley, 13.

ere l by the mortgage.[1] And in New Hampshire, a mortgage cannot cover future advances; though, if made for a present debt and future advances, it will be good for the former, but not for the latter.[2] But such mortgage would be good, though made in New Hampshire, if the estate mortgaged were situated in Massachusetts.[3] As to the right of the holder of such a mortgage, by making future advances, to acquire thereby a priority of security for the same over a second mortgage made between the execution of the first and the advances made according to the provisions of the first, there seems to be a difference of opinion in the courts. * The [*542] court of Connecticut held, that, where the mortgagee was by his contract with the mortgagor bound to make the advances intended to be secured by the mortgage, he would take precedence of intermediate mortgagees.[4] But the general rule seems to be, that such future advances will be postponed to mortgages made and recorded after the one providing for such advances, and before they were actually made, as well as to mortgages of which the mortgagee making the advances had notice before making them.[5] And this seems now to be the settled rule of English law, although, in the early case of Gordon *v.* Graham,[6] Lord Cooper held otherwise.[7] In one case, the mortgagee advanced £1,250, and took a mortgage to secure £1,500, intending to include a future advance. On the same day, the mortgagor made a second mortgage to one having no notice of the first, and it was held that he took the mortgage subject to £1,250 only.[8]

[1] Miller *v.* Whittier, 36 Me. 577; Truscott *v.* King, 2 Seld. 147.

[2] Comp. Stat. 1853, c. 137, § 3; 1867, c. 122, § 3; New Hampshire Bank *v.* Willard, 10 N. H. 210; Johnson *v.* Richardson, 38 N. H. 353.

[3] Goddard *v.* Sawyer, 9 Allen, 78.

[4] Crane *v.* Deming, 7 Conn. 387; Boswell *v.* Goodwin, 31 Conn. 74; Cox *v.* Hoxie, 115 Mass. 120, sustains this view.

[5] Spader *v.* Lawler, 17 Ohio, 371; Frye *v.* Bank of Illinois, 11 Ill. 367. See Brinkerhoff *v.* Marvin, 5 Johns. Ch. 326; Ter Hoven *v.* Kerns, 2 Penn. St. 96; Bank of Montgomery County's Appeal, 36 Penn. St. 172.

[6] Gordon *v.* Graham, 2 Eq. Cas. Abr. 598.

[7] Rolt *v.* Hopkinson, 25 Beav. 461; Shaw *v.* Neale, 20 Beav. 182, s. c. 6 House of Lords Cas. 597; Powell, Mortg. 534 a, note e. See this subject treated of, and cases cited, 20 Am. L. Reg. 273.

[8] Menzies *v.* Lightfoot, L. R. 11 Eq. 459.

42 *a*. The above doctrine, giving to a mortgagee a preference for future advances over a known subsequent mortgage, if he was bound to make them, is recognized in the same court in subsequent cases, and is declared to be good law by Mr. Redfield, late Ch. J. of Vermont, in his note to Boswell *v*. Goodwin, cited below.[1] But the extent to which the holder of a mortgage to secure future advances can acquire a precedence over a mortgage subsequently made upon the same estate, for advances voluntarily made after such second mortgage has been brought home to the knowledge of the first mortgagee, or put upon record, has been a subject of much discussion. The doctrine of Gordon *v*. Graham, that a voluntary subsequent advance made by a prior mortgagee will take precedence of a second mortgage, though known to such prior mortgagee before making it, may be considered as directly overruled by the English courts,[2] and by the American courts generally,[3] though still retained, it seems, in Maryland.[4] A question was raised in Michigan, how far a first mortgagee may make advances, and hold a precedence under his mortgage over a second existing mortgage for the sums advanced, first, if he could do this after notice of the second mortgage having been made; and, second, whether a record of such second mortgage was constructive notice to him? It was held, that if he was, by his original contract, bound to make such advances, he had no occasion to look to the records to see if a second mortgage had been made, and would take precedence for the sums so advanced. If not so bound, and he make a second advance, it is at his peril; and if a second mortgage has been made and recorded, he would be postponed to that, in respect to such advance, the putting the mortgage on record being equivalent to actual notice.[5] And it may be assumed to be well settled, that if a mortgagee under a mortgage, to

[1] Rowan *v*. Sharpe's Rifle Mg. Co., 29 Conn. 329; Boswell *v*. Goodwin, 12 Am. Law Reg. 79, and note, 91, 92.

[2] Rolt *v*. Hopkinson, 3 De G. & J. 177; Shaw *v*. Neale, 6 H. L. Cas. 597.

[3] Bank of Montgomery County's Appeal, 36 Penn. St. 172; Robinson *v*. Williams, 22 N. Y. 380; Bell *v*. Fleming, 1 Beasley (N. J.), 1, 16; Brinkerhoff *v*. Marvin, 5 Johns. Ch. 326; Frye *v*. Bank of Illinois, 11 Ill. 367, 381.

[4] Wilson *v*. Russell, 19 Md. 494, 536.

[5] Ladue *v*. Detroit, &c. R. R., 13 Mich. 380, 408.

secure future advances, make such advances after knowledge of a subsequent incumbrance, by a mortgage or judgment, upon the same estate, he will, as to such second incumbrancer, have only such equities in respect to such advances as he would have had if his mortgage, to that extent, had borne date the day of such advances. This doctrine is illustrated in the case of Shaw *v.* Neale, cited below, where the second mortgagee was admitted to redeem as against the first by paying the advancements made prior to his own mortgage, and then the first was admitted to redeem against the second by paying the debt secured by the second mortgage, together with what the second mortgagee had paid to redeem from him. So in Boswell *v.* Goodwin, cited below, the first mortgagee, after having heard that a second mortgage had been made upon the estate included in his own, renewed a note against which he was indemnified by the first mortgage, and indorsed a new note, against which he was also in terms thereby indemnified, and it was held, that, so far as the renewal of the note extended, it was a claim precedent to the second mortgage, as it stood in the place of the original note. But in respect to the second note, he was postponed to the second mortgage.[1]

An important question remains in this connection, as to what shall be sufficient notice to the first mortgagee of the existence of the second mortgage, to prevent his availing himself of his mortgage as security for advances made after such notice. Must it be actual notice? or will the recording of the second mortgage be sufficient constructive notice? In Robinson *v.* Williams, above cited, the court seem to consider the law settled, that he must have actual notice, and that merely recording the second mortgage will not be sufficient. The case of McDaniels *v.* Colvin[2] unequivocally maintains the same doctrine. In Frye *v.* Bank of Illinois,[3] the court say that the second mortgage will take precedence of advances made by the first mortgagee "with notice of the second mortgage." But what that notice shall be, the court

[1] Boswell *v.* Goodwin, 31 Conn. 74. [2] McDaniels *v.* Colvin, 16 Vt. 300.
[3] Frye *v.* Bank of Illinois, 11 Ill. 367, 381.

had no occasion to settle, as the first mortgagee happened to be the recording officer, and, as such, recorded the second mortgage. In Craig *v.* Tappin,[1] the first mortgagee knew that the mortgagor intended to secure the second mortgagee's debt by mortgage before he made the advances in question. And in Boswell *v.* Goodwin, cited above, the first mortgagee had heard of the second mortgage before he made the advances. In Bell *v.* Fleming,[2] the court treat the question thus: "Whether it will secure advances to the time only when the subsequent incumbrance was actually executed, or to the time of actual notice of such future incumbrance, may be deemed not altogether a settled question." But in Spader *v.* Lawler,[3] the court of Ohio hold that the record of the second mortgage was such a notice to the holder of the first as to postpone him as to all advances made after the second deed was recorded. The case of Parmentier *v.* Gillespie [4] is considered as favoring this doctrine.* But the case of Rowan *v.* Sharps' Rifle Co. favors the idea that a prior mortgagee would not be bound by the record of a subsequent mortgage unless notice of it is brought home to him in some other manner. And for the limitation in this respect, adopted by the courts of Michigan, reference may be had to the case of Ladue *v.* Detroit, &c., Railroad, above cited.[5]

43. As a general proposition, a man cannot mortgage property which he does not own. But whatever buildings, improvements, or fixtures, a mortgagor puts upon mortgaged

* NOTE. — Mr. Redfield, late Ch. J. of Vermont, has discussed this question in two able articles in the American Law Register, one of them being a note to the case above cited of Boswell *v.* Goodwin, and is inclined to think that the rule adopted by the Ohio court will finally prevail in all the States; and his opinion, though not an authority, is entitled to great weight as that of a jurist of wide experience and observation, though he admits that at present, the general view of the American and English courts is in favor of requiring actual notice. 12 Am. Law Reg. 19; Id. 92.

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[1] Craig *v.* Tappin, 2 Sandf. Ch. 78.

[2] Bell *v.* Fleming, 1 Beasley (N. J.), 1, 16.

[3] Spader *v.* Lawler, 17 Ohio, 371, 380.

[4] Parmentier *v.* Gillespie, 9 Penn. St. 86.

[5] Rowan *v.* Sharps' Rifle Co., 29 Conn. 325; Ladue *v.* Detroit, &c., R. R., 13 Mich. 380, 408.

premises, become a part of the premises, and are covered by the mortgage ;[1] and this would be understood to embrace a steam saw-mill, engines, fixtures, &c.[2] And this extends to equitable as well as legal mortgages.[3] And the principle is very broad, including trade fixtures attached to buildings by bolts and screws, although they may be removed without injury to the freehold.[4] So it applies to whatever is added to a railroad under mortgage, although furnished by the holders of a subsequent mortgage.[5] And to all improvements made upon mortgaged premises. Neither the mortgagor nor his grantee can claim allowance for the same.[6]

44. And this has been carried in the case of railroads so far as to embrace the franchise, and, as an accession to that, whatever property the corporation afterwards acquired.[7] The courts of New York at one time treated the rolling-stock, cars, engines, &c., of such a company as fixtures of the road, and as passing under a mortgage of the road.[8] But in a late case they hold such rolling-stock to be personalty, and not a part of the realty.[9] The question how far the rolling-stock, &c., of a railroad passes under a mortgage of the road as a fixture or part of the realty, has been much discussed and

[1] Winslow *v.* Merchants' Ins. Co., 4 Met. 306 ; Pettengill *v.* Evans, 5 N. H. 54 ; Sands *v.* Pfeiffer, 10 Cal. 258 ; Butler *v.* Page, 7 Met. 40 ; Burnside *v.* Twitchell, 43 N. H. 390 ; Walmsley *v.* Milne, 7 C. B. N. S. 115, case of a steam-engine, &c. ; Snedeker *v.* Warring, 2 Kern. 170, case of a statue ; Laflin *v.* Griffith, 35 Barb. 58 ; Jones *v.* Richardson, 10 Met. 488 ; Place *v.* Fagg, 4 Man. & R. 277 ; *ante*, vol. 1, pp. *3, *4, *7 ; Hoskin *v.* Woodward, 45 Penn. 42 ; Davis *v.* Buffum, 51 Me. 161 ; Preston *v.* Briggs, 16 Vt. 124 ; Cole *v.* Stewart, 11 Cush. 182.

[2] Brennan *v.* Whitaker, 15 Ohio St. 446 ; Daniels *v.* Rowe, 25 Iowa, 405.

[3] Tebb *v.* Hodge, L. R. 5 C. P. 73.

[4] Longbottom *v.* Berry, L. R. 5 Q. B. 123.

[5] Galveston R. R. *v.* Cowdry, 11 Wall. 482.

[6] Martin *v.* Beatty, 54 Ill. 100.

[7] Pierce *v.* Emery, 32 N. H. 484 ; Willink *v.* Morris Canal, 3 Green, Ch. 377 ; Seymour *v.* Canandaigua & N. Railroad, 25 Barb. 284. The court, in Philadelphia, &c. R. R. *v.* Woelper, 64 Penn. St. 372, waive the point. See also on the subject, *ante*, vol. 1, p. *4.

[8] Farmers' Loan Co. *v.* Hendrickson, 25 Barb. 484 ; Coe *v.* Columbus, &c. R. R. Co., 10 Ohio St. 390 ; Dinsmore *v.* Rac. & Miss. R. R. Co., 12 Wis. 649. *Contra*, see Sangamon R. R. Co. *v.* Morgan, 14 Ill. 163 ; State *v.* Northern C. R. Co., 18 Md. 217.

[9] Hoyle *v.* Plattsburg, &c. R. R., 54 N. Y. 314 ; Randal *v.* Elwell, 52 N. Y. 521.

variously settled in particular cases, and it is difficult to say how far the doctrine may be considered as established. The decision of the United States Court in Minnesota Co. *v.* St. Paul Co. favors the idea of its being a part of the realty, and passing by a mortgage of that. The reporter gives in a note the argument of Mr. Carpenter in support of that position.[1] In Vermont, the matter seems to be determined by statute, declaring it a part of the realty.[2] And such appears to be the opinion of the court of Kentucky.[3] In Illinois, such rolling-stock is held a part of the realty.[4] Mr. Redfield has also discussed the matter at length;[5] and it may be stated in this connection, that no railroad corporation can mortgage its road and franchise without legislative authority so to do.[6]

45. The mode of obtaining a foreclosure of a mortgage, and the effect of this, will be more fully considered hereafter. As a general proposition it may be remarked, that, by such foreclosure, the mortgagee acquires an absolute estate in the premises; yet not only may the mortgagee, after entering for condition broken and for purposes of foreclosure, abandon his possession and waive such entry,[7] but if a mortgagee, after making entry, sue a tenant in possession who is a tenant at will of the mortgagor, in a writ in entry, it is not a waiver of the actual entry already made by him, unless in such suit he prays for conditional judgment.[8] But he may waive [*543] a foreclosure itself, *and open the mortgagor's right of redemption by accepting payment of the mortgage-debt as an existing one;[9] or, in some cases, even suing for the debt, or for an alleged balance due upon the mortgage, on the ground that the mortgaged estate was of less value

1 2 Wall. U. S. 644, 645.

2 Gen. Stat. p. 237, Miller *v.* R. & W. Railroad, 36 Vt. 490.

3 Phillips *v.* Winslow, 18 B. Mon. 431.

4 Palmer *v.* Forbes, 23 Ill. 301; McLaughlin *v.* Johnson, 46 Ill. 165; *ante*, vol. 1, p. *4.

5 Redfield, Railroads, vol. 2, 533, 536.

6 Commonwealth *v.* Smith, 10 Allen, 448.

7 Botham *v.* McIntier, 19 Pick. 346; White *v.* Rittenmyer, 30 Iowa, 273.

8 Fletcher *v.* Carey, 103 Mass. 475.

9 Lawrence *v.* Fletcher, 10 Met. 344; Deming *v.* Comings, 11 N. H. 474; Batchelder *v.* Robinson, 6 N. H. 12.

than the amount of the debt.[1] On the other hand, a mortgagee cannot be made the absolute owner of the mortgaged estate against his will, nor until after he shall have duly foreclosed the mortgagor's right of redemption.[2]

46. In bringing to a close this somewhat extended sketch of the interest or estate of a mortgagee in the mortgaged premises, it may be proper to remind the reader that there are five different stages or degrees in such an interest, except in some few of the States, as heretofore explained; namely, first, that which is created by the deed of mortgage before the condition has been broken, and before any entry made or possession taken. At this stage, the mortgagee's interest, except as against the mortgagor, and for purposes of protecting the title, seems to be chiefly and properly in the nature of a lien for the security of a debt. And a performance of the condition defeats this interest, without any act of release on the mortgagee's part, unless such act is required by the terms of the deed.[3] The second is where the mortgagee enters and holds possession before condition broken. Here the mortgagee has, added to his right of property as a lien, the legal rights of a tenant in possession. But in receiving the rents and profits of the land he may be considered, in some sort, as an agent of the mortgagor.[4] The third is where the condition has been broken, but no entry has yet been made. Here equity considers the legal estate to be in the mortgagee, though his legal rights and remedies are in the nature of a reversioner's, of one not in possession, but having a right to immediate possession without the necessity of any
* notice to the tenant. The fourth is where he has [*544]
entered and taken possession for condition broken.
His possession is under his title, and he takes the profits in the character of mortgagee.[5] He has, in such case, a legal estate and possession, with all the rights of legal ownership,

[1] Dashwood *v.* Blythway, 1 Eq. Cas. Abr. 317; Lockhart *v.* Hardy, 9 Beav. 349; Massachusetts Gen. Stat. 1860, c. 140, § 36.

[2] Goodwin *v.* Richardson, 11 Mass. 469; Eaton *v.* Whiting, 3 Pick. 484.

[3] Holman *v.* Bailey, 3 Met. 55; Erskine *v.* Townsend, 2 Mass. 493; Stewart *v.* Crosby, 50 Me. 132; Grover *v.* Flye, 5 Allen, 544.

[4] Dexter *v.* Arnold, 1 Sumn. 109. [5] Dexter *v.* Arnold, 1 Sumn. 109.

and all the remedies appertaining to such an ownership, subject, however, to have these all defeated by a redemption on the part of the mortgagor. The fifth is the final and absolute title which the mortgagee in some States acquires by a foreclosure of his mortgage, and which cuts off all interest before remaining in the mortgagor.

SECTION V.

OF THE MORTGAGOR'S INTEREST.

1–4. Nature and incidents of the mortgagor's estate.
5. Effect upon it of performance of the condition.
6. Estate of mortgagor in respect to strangers.
7, 8. How far liable for debts of mortgagor.
9. Of his right to damages if land taken for roads, &c.
10. When a mortgage is not an alienation.
11. How far liable for rents.
12. Of dower, &c., in mortgaged estates.
13. Effect of disseisin of mortgagor.
14, 15. Of tenure between mortgagor and mortgagee.
16. Of recovery of possession by mortgagor.
17, 18. Of the nature of the equity of redemption, and how enforced.
19, 20. Who may redeem, and how.
20 *a*. When enforced for a larger sum than then due.
21, 22. Of contribution among several for redemption.
23, 24. Of parties to and forms of the process to redeem.
25, 26. Mortgagor's right, when barred by limitation.
27. Mortgagee's right, when barred by limitation.
28. Effect of change, or statute bar of the debt.
29. Of payment as a discharge or assignment.

1. THE interest of a mortgagor in the mortgaged premises will be found to be much more simple, uniform, and well-defined, both in law and equity, than that of a mortgagee. At one time it was held, that, after a breach of the condition of his mortgage, a mortgagor had a mere right to recover back, by the payment of the money due, the estate which had passed out of him. But it is now settled that he has an actual estate, which he may devise or grant, though he holds possession and receives the profits at the will of the mortgagee, who

may evict him without notice.[1] And the language of the court of Iowa is that the estate of the mortgagor in the lands is real property, and is conveyed, devised, and taken upon legal process, as such.[2]

2. Nor will a mortgage made by the owner in fee operate except *pro tanto*, to revoke a will already made, whereby the same land has been previously devised,[3] even though the mortgage be to the devisee himself.[4]

*3. This estate of a mortgagor is governed by the [*545] same rules, as to its devolution by descent or otherwise, as any other estate in lands; and the same technical forms have been required in order to make a valid devise of an equity of redemption, as of land itself, ever since the time of Lord Hardwicke (1737).[5] Thus, where the deed contains a power of sale, with a provision that any surplus, after satisfying the debt, shall be paid to the mortgagor or his executors, &c., if the sale is made in the life of the mortgagor, the surplus goes to him or his executors as personal estate; if not till after his death, it goes to his heir, the estate having, in the mean time, become the heir's by descent.[6]

4. In England, until the recent statute of 3 & 4 Wm. IV. c. 104, an equity of redemption was not regarded as legal assets in the hands of the mortgagor's heir, though previously held as assets in equity. But that statute has now changed the law in this respect.

5. If the mortgagor performs the condition of his mortgage according to its terms, he at once defeats the estate of the mortgagee, and is in of his original estate, without any further act, unless his deed requires some deed of release from the mortgagee; and he may have an action at common law

[1] Co. Lit. 205 a, Butler's note, 96; Coote, Mortg. 23; White *v.* Whitney, 3 Met. 81; Laussat's Fonbl. Eq. 491, n.; Buchanan *v.* Monroe, 22 Texas, 537.

[2] White *v.* Rittenmyer, 30 Iowa, 272.

[3] Thorne *v.* Thorne, 1 Vern. 141; Hall *v.* Dench, Id. 329; Casborne *v.* Scarfe, 1 Atk. 606; McTaggart *v.* Thompson, 14 Penn. St. 149; Ledyard *v.* Butler, 9 Paige, Ch. 132.

[4] Baxter *v.* Dyer, 5 Ves. 656.

[5] Chamberlain *v.* Thompson, 10 Conn. 243; Coote, Mortg. 26.

[6] Wright *v.* Rose, 2 Sim. & S. 323; Bourne *v.* Bourne, 2 Hare, 35.

against the mortgagee, if in possession, to recover the land. But a tender afterwards does not.[1]

6. A mortgagor, so long as he has an equity of redemption, has an estate which he can convey in mortgage by successive deeds, which will take precedence according to their order in time, where the subsequent mortgagee has had notice, actual or constructive, of the prior ones.[2] Thus where one made three successive mortgages, in the first of which was a power of sale, and the debtor's equity of redemption was sold upon execution. The first mortgagee having sold the estate, and a surplus remaining after satisfying his own mortgage, it was held that the purchaser of the equity could claim only the surplus, if any, of this excess, after the second and third mortgages had been satisfied in full.[3] But, by taking a second mortgage, the mortgagee does not assume any personal responsibility to pay the prior mortgage.[4] Nor does the grant by a mortgagor of his estate, subject to a prior mortgage, make the purchaser personally liable for the debt unless the same be in terms created by the deed conveying the same.[5] And the cases seem to agree in all the States in asserting for the mortgagor a complete legal estate, with all its incidents, as to all the world but the mortgagee and those claiming under him.[6] It has accordingly been held that a mortgagor may sue for and recover the mortgaged land against a stranger. And no objection can be interposed that a third person holds a mortgage on the same, the condition of which has

[1] Holman *v.* Bailey, 3 Met. 55; Erskine *v.* Townsend, 2 Mass. 493; Grover *v.* Flye, 5 Allen, 544; Currier *v.* Gale, 9 Allen, 522; Maynard *v.* Hunt, 5 Pick. 240; Stewart *v.* Crosby, 50 Me. 130.

[2] Coote, Mortg. 34; Bigelow *v.* Wilson, 1 Pick. 485; Newall *v.* Wright, 3 Mass. 138.

[3] Andrews *v.* Fisk, 101 Mass. 424.

[4] Babcock *v.* Jordan, 24 Ind. 22.

[5] Gage *v.* Brewster, 31 N. Y. 221; *ante*, p. *518; *post*, *571, vol. 3, *672.

[6] Blaney *v.* Bearce, 2 Greenl. 132; Wilkins *v.* French, 20 Me. 111; Groton *v.* Boxborough, 6 Mass. 50; Bradley *v.* Fuller, 23 Pick. 1; White *v.* Whitney, 3 Met. 81; Orr *v.* Hadley, 36 N. H. 578; Felch *v.* Taylor, 13 Pick. 133; Willington *v.* Gale, 7 Mass. 138; Punderson *v.* Brown, 1 Day, 993; Clark *v.* Beach, 6 Conn. 142; Cooper *v.* Davis, 15 Conn. 556; Schuylkill Co. *v.* Thoburn, 7 S. & R. 411; Asay *v.* Hoover, 5 Penn. St. 21; Waters *v.* Stewart, 1 Caines. Cas. 47; Hitchcock *v.* Harrington, 6 Johns. 290.

been broken.[1] It is accordingly * liable for the mort- [*546]
gagor's debts: and if levied upon and sold on execution, the purchaser may have trespass against him for acts done by him subsequently upon the premises, unless the mortgagee shall at the time be in possession.[2]

7. In Massachusetts, after such a levy and sale, the mortgagor still has a right to redeem the equity of redemption, and thereby restore himself to the right to redeem the estate from the mortgage. And this right he may mortgage, and the right in equity to redeem the prior right from the second mortgagee may be levied upon as his estate.[3]* If a judgment becomes a lien upon an equity of redemption, by attachment or otherwise, and the mortgage is discharged, it attaches to the land itself.[4] A mortgagee may not, however, sue the note which is secured by a mortgage, and levy his execution upon the maker's right in equity to redeem the estate from the same mortgage.[5] But if such note has been *bona fide* sold and indorsed to a stranger by the mortgagee, without assigning the mortgage, the purchaser may sue the mortgagor and levy upon his equity of * redemption.[6] So [*547]
the mortgagee in Maine may sue the mortgage-debt,

* NOTE. — Most of the States have provided by statute for the levy of executions upon the estates of mortgagors. See Alabama Code, 1852, § 2455; Connecticut, Comp. Laws, 1854, § 197; Florida, Thompson's Dig. p. 355; Michigan, Comp. Laws, 1857, p. 938; North Carolina, Rev. Code, 1854, c. 45, § 5; Huntington *v.* Cotton, 31 Miss. 253; Curtis *v.* Root, 20 Ill. 53; State *v.* Lawson, 1 Eng. (Ark.) 269; Mass. Gen. Stat. 1860, c. 103, §§ 1, 33, 39; New York, Waters *v.* Stewart, 1 Caines, Cas. 47; Maine, Rev. Stat. c. 76, § 29.

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[1] Woods *v.* Hilderbrand, 46 Mo. 284.

[2] White *v.* Whitney, 3 Met. 81; Fernald *v.* Linscott, 6 Greenl. 234; Fox *v* Harding, 21 Me. 104.

[3] Reed *v.* Bigelow, 5 Pick. 281.

[4] M'Cormick *v.* Digby, 8 Blackf. 99; Freeman *v.* M'Gaw, 15 Pick. 82.

[5] Lyster *v.* Dolland, 1 Ves. 431; Atkins *v.* Sawyer, 1 Pick. 351; Camp *v.* Coxe, 1 Dev. & Bat. 52; Deaver *v.* Parker, 2 Ired. Eq. 40; Washburn *v.* Goodwin, 17 Pick. 137; Goring *v.* Shreve, 7 Dana, 64; Waller *v.* Tate, 4 B. Mon. 529. See Tice *v.* Annin, 2 Johns. Ch. 125; see also Johnson *v.* Stevens, where mortgagor made a second mortgage, including other land, held that first mortgagee may levy on the second equity, 7 Cush. 431.

[6] Crane *v.* March, 4 Pick. 131; Waller *v.* Tate, 4 B. Mon. 529; Andrews *v.* Fisk, 101 Mass. 424.

and levy upon mortgagor's equity of redemption to satisfy it.[1] In New York and Indiana, by statute, a mortgagee may not sell the equity of redemption of his mortgagor on a judgment recovered upon the mortgage-debt. And the same is held upon authority in several other States.[2] It is upon the principle above stated, that where the principal in a note procured another to be his surety, and gave him a mortgage as collateral security therefor, the payee of the note was not at liberty to sue on the note, and levy upon the principal's equity of redemption.[3] But where the mortgagor made a second mortgage of the estate, the first mortgagee was held authorized to sue his mortgage-debt, and levy his execution upon the debtor's right to redeem from the second mortgage.[4] One ground upon which the court in Atkins *v.* Sawyer[5] denied the right in the mortgagee to sue the mortgage-debt and levy upon the equity of redemption was, that there arises an implied contract on the part of the mortgagee with the mortgagor, that, as to that land, he would give him the ordinary time of redemption, which he ought not to be at liberty to curtail by selling the mortgagor's right to redeem; but that no such implied contract exists in respect to the equity of redemption from a second mortgage made to a third party.

8. This right of levying upon a debtor's equity of redemption did not exist at common law, because, as has been before stated, that equity was not originally regarded as an estate.[6] But in the United States, equities of redemption have, as to their being subject to debts, generally been placed on the same ground as legal estates, though such is not the [*548] case in some of *the States. Thus, in applying the law of Maryland, the United States court held to

[1] Crooker *v.* Frazier, 52 Me. 406; Porter *v.* King, 1 Me. 297.

[2] New York, Rev. Stat. 1852, vol. 2, 617; Palmer *v.* Foote, 7 Paige, Ch. 437; Tice *v.* Annin, 2 Johns. Ch. 125; Ind. Rev. Stat. 1852, vol. 2, 177; Goring *v.* Shreve, 7 Dana, 67; Powell *v.* Williams, 14 Ala. 476; Barker *v.* Bell, 37 Ala. 358; Baldwin *v.* Jenkins, 23 Miss. 206; Buck *v.* Sherman, 2 Doug. (Mich.) 176; Hill *v.* Smith, 2 McLean, 446; Thornton *v.* Pigg, 24 Mo. 249. But the contrary is held in Freeby *v.* Tupper, 15 Ohio, 467; Pierce *v.* Potter, 7 Watts, 475; Porter *v.* King, 1 Greenl. 297. And see Trimm *v.* Marsh, 54 N. Y. 599, *contra*.

[3] Brownston *v.* Robinson, 4 B. Mon. 143.

[4] Johnson *v.* Stevens, 7 Cush. 431. [5] Atkins *v.* Sawyer, 1 Pick. 351.

[6] Plunket *v.* Penson, 2 Atk. 290; Forth *v.* Norfolk, 4 Madd. 504; 1 Sand. Uses, 275.

the rule of the common law, that an equity of redemption could not be taken in execution, while in New York, Connecticut, and others of the States, it is treated as a common-law right.[1]

9. In Massachusetts, if land under a mortgage is taken by a railroad company, in the exercise of the right of eminent domain, the mortgagor, if in possession, may claim the damages for such taking. But in New York the mortgagee may claim them.[2] Upon the same principle, where the value of mortgaged premises depended upon the privilege of drawing water for the use of a mill thereon from a public canal, and this having been changed by the State, with provision for making compensation to persons thereby injured, it was held that the mortgagee, in this case, might claim the damages, if the estate was insufficient without them to satisfy the mortgage-debt.[3] But in Massachusetts a mortgagor in possession may maintain a complaint and recover damages for flowing his land under the mill acts.[4] But so far as notice is required to be given to the owner of land of the intended location of a highway across it,[5] or notice to repair the street in front of it,[6] or of a petition to enforce a mechanic's lien upon it,[7] the mortgagor, if in possession, is deemed the owner. So taxes upon lands under mortgage, and which constitute a lien upon the same, are assessed to the mortgagor if in possession, and the notices and proceedings requisite to enforce their payment by sale are to and with the mortgagor as owner.[8]

10. By the provisions of policies of insurance in mutual fire-insurance companies, there is generally inserted a clause

[1] Van Ness *v.* Hyatt, 13 Pet. 294; Jackson *v.* Willard, 4 Johns. 41; Penderson *v.* Brown, 1 Day, 93. In South Carolina it is made subject to execution by statute. State *v.* Laval, 4 McCord, 336. But in Illinois it is said not to be subject to sale on execution. Hill *v.* Smith, 2 McLean, 446.

[2] Breed *v.* Eastern Railroad, 5 Gray, 470, n.; Astor *v.* Hoyt, 5 Wend. 603.

[3] Bank of Auburn *v.* Roberts, 44 N. Y. 192, 202.

[4] Paine *v.* Woods, 108 Mass. 160.

[5] Parish *v.* Gilmanton, 11 N. H. 293. See Wright *v.* Tukey, 3 Cush. 290.

[6] Norwich *v.* Hubbard, 22 Conn. 587.

[7] Howard *v.* Robinson, 3 Cush. 119.

[8] Parker *v.* Baxter, 2 Gray, 185; Mass. Gen. Stat. 1860, ch. 11, § 8; Ralston *v.* Hughes, 13 Ill. 469; Coombs *v.* Warren, 34 Me. 89; Frye *v.* Bank of Illinois, 11 Ill. 367; Kortright *v.* Cady, 23 Barb. 490.

whereby an alienation of the estate by the insured, with certain exceptions, will avoid the policy. But it has been held, that a mortgage is not such an alienation as will avoid it.[1] So it was held that a mortgage was not an alienation when applied to a contract giving another the right of pre-
[*549] emption.[2] So in an * action of ejectment brought by a mortgagor, it is no defence that the title to the premises is in a third person as mortgagee, if the tenant do not hold under such mortgagee.[3] Yet when a mill-owner flowed mortgaged lands which were in the possession of the mortgagor, who released the damages to the mill-owner, it was held not to bind the mortgagee in respect to damages accruing after he took possession under his mortgage.[4] Nor could the mortgagor of an undivided share of real estate bind his mortgagee by any deed of partition made between the mortgagor and his co-tenant.[5]

11. The mortgagor cannot be charged with rents of the premises before the mortgagee shall have obtained actual possession, even though the premises are an inadequate security for the debt; and this extends to a grantee of the mortgagor, and includes rents accruing after the commencement of process to obtain possession.[6] If the mortgagee suffer the mortgagor to retain possession, and he commit acts which tend to deteriorate the premises, and the mortgagor then sells to a stranger, the latter will not be accountable for any part of the debt beyond what the premises may be sold for by order of the court. On the other hand, if the mortgagor or one

[1] Jackson *v.* Massachusetts Ins. Co., 23 Pick. 418; Conover *v.* Mutual Ins. Co., 3 Denio, 254; Rice *v.* Tower, 1 Gray, 426; Pollard *v.* Somerset Ins. Co., 42 Me. 221.

[2] Lovering *v.* Fogg, 18 Pick. 540.

[3] Den *v.* Dimon, 5 Halst. 156; Ellison *v.* Daniels, 11 N. H. 274. The contrary was held after forfeiture by mortgagor in Meyer *v.* Campbell, 12 Mo. 603, the mortgagee there being regarded as seised of the legal estate. Brown *v.* Snell, 6 Flor. 745.

[4] Ballard *v.* Ballardvale Co., 5 Gray, 468. [5] Colton *v.* Smith, 11 Pick. 311.

[6] Coote, Mortg. 325; Fitchburg Co. *v.* Melvin, 15 Mass. 268; Gibson *v.* Farley, 16 Mass. 280; Boston Bank *v.* Reed, 8 Pick. 459; Wilder *v.* Houghton, 1 Pick. 87; Mayo *v.* Fletcher, 14 Pick. 525; Clarke *v.* Curtis, 1 Gratt. 289; Hughes *v.* Edwards, 9 Wheat. 489; Syracuse City Bank *v.* Tallman, 31 Barb. 201; Whitney *v.* Allen, 21 Cal. 233; Walker *v.* King, 44 Vt. 612.

standing in his place enhance the value of the premises by improvements, these become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made, after satisfying the debt.[1] If mortgagor, or any one under him, make betterments upon the mortgaged estate, the tenant, in a suit by the mortgagee for possession, cannot claim any abatement on account of these; the only way in which he can avail himself of them is by redeeming the estate.[2] So if the mortgagor plant trees for nursery purposes, they become a part of the mortgaged estate, though intended for sale in market, and belong to the mortgagee, nor has the mortgagor a right to remove them.[3] And where one partner owned land, and the partnership erected fixtures upon it while it was under mortgage by the owner, it was held that the mortgage attached to the fixtures as a part of the realty, and held them.[4]

12. Among the incidents of a mortgagor's estate are those of curtesy and of dower, and of conferring upon the owner, as a freeholder, a settlement in the town in which he resides: * the distinction, in this respect, which once [*550] existed in England between curtesy and dower being removed by the statute 3 & 4 Wm. IV. c. 105.[5] And where the estate has been sold and turned into money to satisfy the mortgage-debt, equity gives dower out of the surplus.[6] *

* Note. — The subject of dower in an equity of redemption is examined under the head of Dower, *ante*, to which the reader is referred. See also Mass. Gen. Stat. c. 90, § 2; Georgia, Cobb, Dig., 1851, p. 163; 1873, p. 305; Alabama, Code, 1852, § 1354; 1867, p. 373; Vermont, Comp. Stat. 1856, c. 54, §§ 2–4; 1862, Appen.; 1870, c. 55; New York, Rev. Stat. 1852, vol. 2, p. 150; Stat. at Large, vol. 1, p. 692; Michigan, Comp. Law, 1857, c. 89, §§ 3–6; 1871, c. 151; Wisconsin, Rev. Stat. 1858, c. 89, § 4; Illinois, Comp. Stat. 1857, vol. 1, p. 152; Rev. Stat. 1874, c. 41; Ark. Dig. of Stat. 1858, p. 451. See 4 Kent, Com. 44, 45.

[1] Hughes *v.* Edwards, 9 Wheat. 489.

[2] Haven *v.* Adams, 8 Allen, 368; Same *v.* B. & Wor. Railroad, Ib. 369.

[3] Maples *v.* Millon, 31 Conn. 598.

[4] Lynde *v.* Rowe, 12 Allen, 100; Phila. &c. R. R. *v.* Woelper, 64 Penn. St. 366, 372.

[5] Clark *v.* Beach, 6 Conn. 142; Chamberlain *v.* Thompson, 10 Conn. 243; 2 Crabb, Real Prop. 859; Groton *v* Boxborough, 6 Mass. 50.

[6] Titus *v.* Neilson, 5 Johns. Ch. 452; Illinois, Comp. Stat. 1857, vol. 1, p. 152, Matthews *v* Duryee, 45 Barb. 69.

13. So far as the entire inheritance of the estate is concerned, there is but one title, and this is shared between the mortgagor and mortgagee, their respective parts when united constituting one title. The mortgagor's possession is so far that of the mortgagee that he cannot disseise him. But in Mississippi the courts hold, upon the question of limitations, that, from the time of forfeiture of the mortgagor's estate by a breach of condition, his possession is, as to the mortgagee, adverse, and the statute begins to run from that date.[1] He cannot make any lease or conveyance which can bind the mortgagee or prejudice his title.[2] If the mortgagor in possession is disseised by a stranger, the mortgagee thereby loses his seisin.[3] So if the mortgagee is disseised, he cannot convey his interest in the estate.[4] And if one of two tenants in common mortgage his share to his co-tenant, he cannot have partition against him, since in respect to his co-tenant he has not sufficient seisin to maintain partition against his own mortgagee.[5] Nor would a mortgagee in possession of undivided land be liable to a process of partition in favor of a mortgagor who owns, or is in possession of, the other undivided share of the estate.[6] The distinction is this: Between the mortgagor and mortgagee, so long as the latter does not treat the former as a trespasser, the possession of the mortgagor is not hostile to or inconsistent with the mortgagee's right. The possession of the mortgagor is, to this extent, the possession of [*551] *the mortgagee.[7] But neither the mortgagor nor

[1] Wilkinson *v.* Flowers, 37 Miss. 579, 585.

[2] Birch *v.* Wright, 1 T. R. 383; Cholmondeley *v.* Clinton, 2 Meriv. 360, s. c. 2 Jac. & Walk. 177; Noyes *v.* Sturdivant, 18 Me. 104; Gould *v.* Newman, 6 Mass. 239; Perkins *v.* Pitts, 11 Mass. 125; Hicks *v.* Brigham, Id. 300; Colton *v.* Smith, 11 Pick. 311; Dexter *v.* Arnold, 2 Sumn. 108; Newman *v.* Chapman, 2 Rand. 93.

[3] Poignard *v.* Smith, 8 Pick. 272.

[4] Dadmun *v.* Lamson, 9 Allen, 85. See Lincoln *v.* Emerson, 108 Mass. 87; *ante*, *519.

[5] Bradley *v.* Fuller, 23 Pick. 1. But if he mortgage it to a stranger, and then makes partition with his co-tenant by mutual releases, in which the mortgagee joins, it throws the entire mortgage upon the share of the mortgagor, and relieves the other share. Torrey *v.* Cook, 116 Mass. 164.

[6] Norcross *v.* Norcross, 105 Mass. 266.

[7] Doe *v.* Barton, 11 A. & E. 307; Partridge *v.* Bere, 5 B. & Ald. 604; Joyner *v.* Vincent, 4 Dev. & Bat. 512; Smartle *v.* Williams, 1 Salk. 245; Hunt *v.* Hunt,

purchaser of his right under a sheriff's sale can maintain ejectment against the mortgagee in possession. All he can do is to redeem by paying the mortgage. Such purchaser may have ejectment against the mortgagor in possession.[1] The possession of the mortgagor is that of the mortgagee, so as to prevent a stranger setting up a title by possession against the mortgagee, so long as the mortgagor is seised.[2] The mortgagee, by accepting a deed from his mortgagor, assents to and cannot deny the mortgagor's title.[3] If one enters into possession as mortgagee under his mortgage, he will not be admitted to deny the title of his mortgagor, and any releases which he may obtain from others will go to strengthen his mortgagor's title.[4] But yet their rights, even in the matter of possession of the premises, are so independent and distinct, that if either, while in possession, or any one claiming under him, commits waste by acts which essentially impair the value of the inheritance, the other may restrain him from so doing by an injunction through a court of chancery.[5] And as an illustration of the distinct interests which a mortgagor and mortgagee may have, even in an incident of the mortgaged estate, it is held, that either may avail himself of a covenant of warranty made to the mortgagor, or the one under whom he claims, as the same runs with the land, and avails whichever of the parties has occasion to resort to it.[6] But if the mortgagee be in possession, the mortgagor cannot sustain trespass against a stranger for entering

14 Pick. 374; Root *v.* Bancroft, 10 Met. 44; Nichols *v.* Reynolds, 1 R. I. 30; Herbert *v.* Hanrick, 16 Ala. 581; Newman *v.* Chapman, 2 Rand. 93; Boyd *v.* Beck, 29 Ala. 703.

[1] Doe *v.* Tunnell, 1 Houst. 320.

[2] Sheafe *v.* Gerry, 18 N. H. 247.

[3] Brown *v.* Combs, 5 Dutch. 36, 42.

[4] Farmers' Bank *v.* Bronson, 14 Mich. 369.

[5] Wms. Real Prop. 355, note; 2 Crabb, Real Prop. 862; Id. 874; Fay *v.* Brewer, 3 Pick. 204; Smith *v.* Moore, 11 N. H. 55; Irwin *v.* Davidson, 3 Ired. Eq. 321; Brady *v.* Waldron, 2 Johns. Ch. 148; Cooper *v.* Davis, 15 Conn. 556; Given *v.* M'Calmont, 4 Watts, 460.

[6] White *v.* Whitney, 3 Met. 81. It is, however, otherwise held in England and Kentucky, and that the legal estate is so far in the mortgagee as to attach to it exclusively the covenants which run with the land. Rawle, Cov. 360–362; Mayor of Carlisle *v.* Blamire, 8 East, 487; Pargeter *v.* Harris, 7 Q. B. 708; McGoodwin *v.* Stephenson, 11 B. Mon. 21. In New Hampshire, a second mortgagee was held entitled to rent of the mortgaged premises accruing from a lessee after entry made, although there was an outstanding mortgage prior to his. Cavis *v.* McClary, 5 N. H. 529.

and going across the premises, if he do no permanent injury to the soil and freehold.[1]

14. Still there is the relation of tenure between the mortgagor and mortgagee, as the former holds of the latter; and the doctrine which forbids any one to controvert the title under which he holds an estate will not admit the former to dispute the title of the latter. Nor may he defeat a solemn deed whereby he has created the mortgagee's title; and, consequently, he will not be admitted to set up a title in a third person, such as a lease made prior to the mortgage, in an action by the mortgagee to enforce his mortgage.[2] A mortgagee, however, may purchase in an outstanding prior judgment title, and hold under it as being paramount to his mortgage title.[3]

15. Courts and writers have undertaken to describe [*552] this * tenancy by likening it to a tenancy at will, or at sufferance and the like, with the view of defining its character.[4] But the nearest approximation they have made to a definition has been to establish certain resemblances to certain tenancies known to the common law, while the obvious discrepancies have shown that they were far from being identical, and illustrated the remark of Lord Mansfield, when speaking of this subject, that "there is nothing so unlike as a simile, and nothing more apt to mislead." Sir Thomas Plumer, in Cholmondeley *v.* Clinton, says: "The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, of trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee, *quo teneam vultus mutantem Protea nodo?*

[1] Sparhawk *v.* Bagg, 16 Gray, 584.

[2] 2 Crabb, Real Prop. 861; Miami Ex. Co. *v.* United States Bank, &c., Wright (Ohio), 249; Doe *v.* Pegge, 1 T. R. 758, n.; Hall *v.* Surtees, 5 B. & Ald. 687; Clark *v.* Baker, 14 Cal. 632; Conner *v.* Whitmore, 52 Me. 185.

[3] Walthall's Ex'rs *v.* Rives, 34 Ala. 96.

[4] Coote, Mortg. 320; Birch *v.* Wright, 1 T. R. 383; 2 Crabb, Real Prop. 857; 1 Smith, Lead. Cas. Am. ed. 404; Larned *v.* Clarke, 8 Cush. 29; Hastings *v.* Pratt, Id. 121; Jackson *v.* Warren, 32 Ill. 340.

The truth is, it is a relation perfectly anomalous, and *sui juris*. The names of mortgagor and mortgagee most properly characterize the relation." [1] These, with the following quotation from the language of Denman, C. J., will serve to explain why no more space has been assigned to this discussion in this work: "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in other terms than in those very words. But the mortgagee may treat the mortgagor as being rightfully in possession, and himself a reversioner, so that, so long as he is not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right." [2]

16. What are the rights and remedies of a mortgagor to recover possession of the mortgaged premises from the mortgagee, who has entered for condition broken, after he has paid the mortgage-debt, were considered while discussing the rights of *mortgagees. It is sufficient here [*553] to say, that in Massachusetts, Maine, and some other States, his remedy is only in equity. He could not sue the mortgagee at common law to recover possession.[3] And the Supreme Court of the United States hold this to be the common-law doctrine upon the subject; and one reason given for it as a rule is, that if the mortgagee have been in possession of the premises, and made improvements, he could not otherwise hold for such improvements if the mortgagor, by tendering the debt, could recover in ejectment. If he sues in equity to redeem his estate, he must do equity before he can obtain a decree for possession.[4] In other States, he is remitted to his legal rights as soon as he shall have paid the debt, and may recover possession in an action against his mortgagee.[5]

[1] Cholmondeley *v.* Clinton, 2 Jac. & Walk. 182, 183. See Walmsley *v.* Milne, 7 C. B. N. S. 133.

[2] Doe *v.* Barton, 11 A. & E. 307; Sheafe *v.* Gerry, 18 N. H. 247.

[3] Coote, Mortg. 528; 4 Kent, Com. 163; Parsons *v.* Welles, 17 Mass. 419; Howe *v.* Lewis, 14 Pick. 329; Wilson *v.* Ring, 40 Me. 116; N. E. Jewelry Co. *v.* Merriam, 2 Allen, 390.

[4] Brobst *v.* Brock, 10 Wall. 536, a case arising in Pennsylvania.

[5] Jackson *v.* Davis, 18 Johns. 7; Jackson *v.* Crafts, 18 Johns. 110; Dean *v.* Spinning, 1 Halst. 466; Morgan *v.* Davis, 2 Har. & McH. 9; Holt *v* Rees, 44 Ill. 30.

17. This right which a mortgagor has to regain his estate discharged of any claim of the mortgagee, by performing the condition of the mortgage after the time is fixed by the terms of his deed, is commonly called his equity of redemption. And the remedy by which he enforces this right is by a bill in equity alone, and not by a suit at law, even if the debt may have been paid.[1] If the mortgagee be in possession, the mortgagor is driven to a process in equity to regain it, although the mortgage may have been satisfied.[2]

17 *a*. It is competent for the legislature to extend the right of redemption on the sale of mortgaged premises beyond the limit existing at the time the contract was made. But a law prohibiting the creditor from selling at all, or from obtaining possession, in any manner, of the premises upon which he holds a mortgage lien, would be void, as being unconstitutional.[3]

18. When, however, the mortgagor has performed the condition of his mortgage, he has no occasion, in England or in this country, to resort to equity. By such performance the estate of the mortgagee is at once defeated; and if he is in possession of the premises, the mortgagor may have ejectment against him to recover the same.[4] And a tender of performance before condition broken has the same effect in defeating the estate of the mortgagee as performance itself would have had.[5] What would be the effect of a tender after condition broken, has been variously held by different courts. It was early held in New York, that it would discharge the mortgage lien; and this was followed in New Hampshire. The question came up in several forms in New York afterwards, and it was held not to be a discharge. But in the latest case cited below, the question is revised and finally settled in favor of its oper-

[1] Pearce *v.* Savage, 45 Me. 90; Pratt *v.* Skolfield, 45 Me. 386; Kenyon *v.* Shreck, 52 Ill. 386.

[2] Stewart *v.* Crosby, 50 Me. 130, 133; Dyer *v.* Toothaker, 51 Me. 380.

[3] Tillotson *v.* Millard, 7 Minn. 521.

[4] 2 Cruise, Dig. 91, note; Erskine *v.* Townsend, 2 Mass. 493; Nugent *v.* Riley, 1 Met. 117; Holman *v.* Bailey, 3 Met. 55; Richardson *v.* Cambridge, 2 Allen, 118; Merrill *v.* Chase, 3 Allen, 339.

[5] Darling *v.* Chapman, 14 Mass. 101; Post *v.* Arnot, 2 Denio, 344; Merritt *v.* Lambert, 7 Paige, Ch. 344; Shields *v.* Lozear, 34 N. J. 496.

ating to discharge the lien.[1] Such is the case in Michigan, and a tender of the debt due, at any time before foreclosure, discharges the lien on the land, though it does not satisfy the debt, and a tender of United States legal tender notes was held sufficient.[2] And in California, a mortgagor may have a suit to redeem the premises before as well as after payment of the debt, although a mortgage carries with it no right to divest the mortgagor of the possession until foreclosure.[3] But where, as is often the case in England, the deed requires the mortgagee to reconvey upon the condition being performed, a mere performance will not, *per se*, defeat the mortgagee's estate.[4]

19. As to the matter who may exercise this right of redemption, it seems to belong to every person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes * in as privy in estate with the mortgagor. [*554] But without this privity, no one can exercise the right.[5] But where a second mortgagee has mortgaged his mortgage, he may, at any time before his own mortgage is foreclosed, redeem from the prior mortgage upon the estate.[6] One holding a bond only, for the conveyance of an equity of redemption, cannot maintain a bill to redeem, nor can any one who has not a legal title.[7] Among those who may redeem are heirs, devisees, executors, administrators, and

[1] Jackson *v.* Crafts, 18 Johns. 110; Willard *v.* Harvey, 5 N. H. 252; Post *v.* Arnot, 2 Denio, 344, overruling the same case, 6 Hill, 65; Kortright *v.* Cady, 23 Barb. 490, s. c. 21 N. Y. 343, overruling the case in Barbour. See also Farmers' Fire Ins. &c. Co. *v.* Edwards, 26 Wend. 541; Hartley *v.* Tatham, 2 Abb. N. Y. Rep. 339; Trimm *v.* Marsh, 54 N. Y. 599.

[2] Caruthers *v.* Humphrey, 12 Mich. 278; Moynahan *v.* Moore, 9 Mich. 9; Van Husan *v.* Kanouse, 13 Mich. 306; Cont. Shields *v.* Lozear, *sup.*

[3] Daubenspeck *v.* Platt, 22 Cal. 335. [4] 2 Cruise, Dig. 91.

[5] 4 Kent, Com. 167; Gibson *v.* Crehore, 5 Pick. 146; 2 Crabb, Real Prop. 903; Story, Eq. Jur. § 1023; Grant *v.* Duane, 9 Johns. 612; Moore *v.* Beasom, 44 N. H. 218; Gage *v.* Brewster, 31 N. Y. 222.

[6] Manning *v.* Markel, 19 Iowa, 104.

[7] McDougald *v.* Capron, 7 Gray, 278. As to who stands in the relation of privity in estate with a mortgagor, see Packer *v.* Rochester & Syracuse R. R. Co., 17 N. Y. 283. See Downer *v.* Wilson, 33 Vt. 1.

assignees of the mortgagor,[1] subsequent incumbrancers,[2] as, for instance, the mortgagee of a reversion as against a prior mortgagee,[3] judgment creditors,[4] tenants for years,[5] a jointress,[6] dowress, and married woman by virtue of her inchoate right of dower in the mortgaged premises,[7] and tenant by curtesy.[8] But in order to a widow's redeeming from a mortgage of her husband, in which she joined, she must, if the mortgagee insists, offer to pay the entire mortgage-debt.[9] So one having an easement in the land.[10] So remainder-men, committees of lunatics, guardians of minors, and what are known as voluntary grantees under the statute of Elizabeth, although the mortgage may be good, *pro tanto*, against such conveyance.[11] Nor can the mortgagee object that the mortgagor conveyed his equity of redemption to defraud creditors.[12] Where there is a trustee or a *cestui que trust* of an estate

[1] Coote, Mortg. 516, including assignees in bankruptcy; Sheldon *v.* Bird, 2 Root, 509; Craik *v.* Clark, 2 Hayw. 22; Merriam *v.* Barton, 14 Vt. 501; Bell *v.* Mayor of New York, 10 Paige, Ch. 49; Smith *v.* Manning, 9 Mass. 422.

[2] Burnet *v.* Denniston, 5 Johns. Ch. 35; Watt *v.* Watt, 2 Barb. Ch. 371; Cooper *v.* Martin, 1 Dana, 23; Brown *v.* Worcester Bank, 8 Met. 47; Thompson *v.* Chandler, 7 Greenl. 377; Allen *v.* Clark, 17 Pick. 47; Taylor *v.* Porter, 7 Mass. 355; Farnum *v.* Metcalf, 8 Cush. 46; Coote, Mortg. 517, 518; Bigelow *v.* Willson, 1 Pick. 493; Goodman *v.* White, 26 Conn. 317. But query how far a third or fourth mortgagee can redeem from the first mortgagee without having first redeemed the intermediate mortgages. See Saunders *v.* Frost, 5 Pick. 259.

[3] Smith *v.* Provin, 4 Allen, 516.

[4] Hitt *v.* Holliday, 2 Lit. 332; Dabney *v.* Green, 4 Hen. & M. 101; Warner *v.* Everett, 7 B. Mon. 262; Elliot *v.* Patton, 4 Yerg. 10; Stonehewer *v.* Thompson, 2 Atk. 440; Cahoon *v.* Laffan, 2 Cal. 595; Tucker *v.* White, 2 Dev. & Bat. Eq. 289; Brainard *v.* Cooper, 10 N. Y. (6 Selden), 356.

[5] Keech *v.* Hall, Doug. 21; Rand *v.* Cartwright, 1 Ch. Cas. 59; Loud *v.* Lane, 8 Met. 517; Bacon *v.* Bowdoin, 22 Pick. 401; Gen. Stat. Mass. 1860, c. 140, § 13; Averill *v.* Taylor, 4 Seld. 44. But whether the owner of a dwelling-house standing upon the land of another which is under mortgage can maintain a bill in equity to redeem the land, is left unsettled in Clary *v.* Owen, 15 Gray, 525.

[6] Howard *v.* Harris, 1 Vern. 190; 2 White & Tud. Cas. 752.

[7] Davis *v.* Wetherell, 13 Allen, 63; Newhall *v.* Savings Bank, 101 Mass. 431

[8] Palmes *v.* Danby, Prec. Ch. 137; Gibson *v.* Crehore, 5 Pick. 146; Eaton *v.* Simonds, 14 Pick. 98; 2 Crabb, Real Prop. 905; Rossiter *v.* Cossitt, 15 N. H. 38.

[9] McCabe *v.* Bellows, 7 Gray, 148; McCabe *v.* Swap, 14 Allen, 191.

[10] Bacon *v.* Bowdoin, 22 Pick. 401.

[11] Coote, Mortg. 517, 518.

[12] Bradley *v.* Snyder, 14 Ill. 263

which is subject to a mortgage, the trustee is the proper party to redeem, and not the *cestui que trust*.[1] If a mortgagor die, pending a bill in equity to redeem the estate, his heir may have a bill of revivor to renew and carry on the suit.[2] The owner of any interest or fractional part, however
* small, of the mortgaged premises, may redeem. But [*555]
in order to do so, he is obliged to pay the whole debt, since the mortgagee cannot be compelled to take his debt by instalments. And by such payment, as will be seen, the one who makes it becomes substituted in equity in place of the mortgagee, in respect to his lien upon the other parts of the estate.[3] Such would be the case if a widow have a right of homestead subject to a mortgage, and she redeems by paying the whole debt.[4]

20. And the proposition seems to be unqualified, that nothing short of paying the whole debt will work a redemption of a mortgaged estate, although the debt itself may be barred by the statute of limitations,[5] or is the property of another than the holder of the mortgage,[6] or the land itself has been sold for less than the debt.[7] But a tender of payment is as effectual a bar to a foreclosure, if made in proper time, as an actual payment would be; and a readiness and offer to pay, if the mortgagee declines to accept, is tantamount to a tender.[8] So if one purchases or acquires by assignment an estate subject to a mortgage, or a right in equity to redeem from an existing mortgage, he will not be at liberty to set up usury in the

[1] Dexter *v.* Arnold, 1 Sumn. 109. [2] Putnam *v.* Putnam, 4 Pick. 139.

[3] Taylor *v.* Porter, 7 Mass. 355; Gibson *v.* Crehore, 5 Pick. 146; Chittenden *v.* Barney, 5 Vt. 28; Mullanphy *v.* Simpson, 4 Mo. 319; 2 Crabb, Real Prop. 911; Smith *v.* Kelley, 27 Me. 237; Powell, Mortg. 339, 340; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 134; Bell *v.* Mayor, &c., 10 Paige, 49, 71; Downer *v.* Wilson, 33 Vt. 1; Fletcher *v.* Chase, 16 N. H. 42. See, as to dowress contributing to redeem, Mass. Gen. Stat. c. 90, § 2; Newton *v.* Cook, 4 Gray, 46; McCabe *v.* Bellows, 7 Gray, 148; Douglass *v.* Bishop, 27 Iowa, 216; McCabe *v.* Swap, *sup.*

[4] Norris *v.* Moulton, 34 N. H. 392.

[5] Balch *v.* Onion, 4 Cush. 559; Pratt *v.* Huggins, 29 Barb. 277; Booker *v.* Anderson, 35 Ill. 86.

[6] Johnson *v.* Candage, 31 Me. 28.

[7] Bradley *v.* Snyder, 14 Ill. 263; 2 Crabb, Real Prop. 911.

[8] Walden *v.* Brown, 12 Gray, 106.

mortgage-debt to defeat or diminish the claim of the mortgagee.[1] If one purchase an equity of redemption at a sheriff's sale, he cannot deny the validity of the mortgage subject to which he purchased; for if there were no mortgage, there could be no equity. But if there are two or more mortgages, he may object that the second or others were void by being fraudulent as to creditors.[2] But the purchaser of an equity of redemption cannot object that the mortgage was void because fraudulent against creditors; nor could he contradict the certificate of possession taken to foreclose, signed by the mortgagor and recorded.[3] And the rule as to the right of a purchaser of an estate under mortgage to set up objections to the mortgage, which the mortgagor himself might have done, seems to be this: If he purchases the right to redeem from such mortgage, he cannot set up a personal disability to make the mortgage, which the mortgagor himself might have done;[4] nor that it was obtained by fraud;[5] nor that the mortgagee has not advanced to the mortgagor the full amount covered by the mortgage, if, when the sale was made, the full amount named in the mortgage was deducted from the price paid for the estate.[6] But if one purchase an estate which is under mortgage, or takes a second mortgage of the same, but does not undertake to pay the first mortgage, or take the estate subject to it, he may take advantage of usury in the first mortgage in the same way as the mortgagor himself might do.[7] So where a mortgagee enters for non-payment of interest or an instalment of the debt, and the mortgagor seeks to redeem, but, before a decree for such redemption, the principal of the debt becomes due, he can only redeem by paying all that is due at the time of the ren-

[1] Shufelt *v.* Shufelt, 9 Paige, 145; Green *v.* Kemp, 13 Mass. 515; Bridge *v.* Hubbard, 15 Mass. 103; Sands *v.* Church, 2 Seld. 347; Berdan *v.* Sedgwick, 44 N. Y. 632; Dix *v.* Wyck, 2 Hill, 522; Weed Sewing Machine *v.* Emerson, 115 Mass. 554.

[2] Russell *v.* Dudley, 3 Met. 147; Stebbins *v.* Miller, 12 Allen, 596; Gerrish *v.* Mace, 9 Gray, 235.

[3] Taylor *v.* Dean, 7 Allen, 252; Russell *v.* Dudley, 3 Met. 147.

[4] Comstock *v.* Smith, 26 Mich. 321.

[5] Fairfield *v.* McArthur, 15 Gray, 526.

[6] Freeman *v.* Auld, 44 N. Y. 50. [7] Berdan *v.* Sedgwick, 44 N. Y. 626, 631.

dition of the decree.[1] And where the mortgagee had entered under a conditional judgment in a suit to foreclose, the amount found due by such judgment was held conclusive upon any party who sought to redeem from his mortgage.[2] It is no bar to a mortgagor's right to redeem a part of a mortgaged estate, that he has lost the right as to another part of it.[3] But no mortgagor can compel a redemption before the time fixed in the deed for performance of the condition.[4] But a mortgage may be made so that, upon the failure to pay any one of several instalments of a debt secured thereby, the mortgage may be enforced as to the whole debt, although not otherwise, in terms, due and payable. And in such case the mortgagor, in order to redeem, must pay the entire sum secured.[5]

20 *a*. But questions have arisen how far it is competent to enforce a mortgage for a larger sum than is due, in the first instance, if there be a failure to pay that sum at any specified time. If the sum to be paid upon such failure be inserted by way of penalty, the court would allow the mortgagor to redeem and relieve the estate from forfeiture.[6] So if one make two or three successive mortgages of the same land, and, upon failing to pay the first of these, he agree with the holder thereof to pay an extra sum as interest if he would delay the enforcement of the mortgage, it was held that as to such extra interest the first mortgage did not constitute a lien upon the land as against the subsequent mortgagees.[7] But a mortgage made to secure the payment of a debt in instalments, with a provision, that, if any instalment shall be in arrear a certain number of days, the whole debt shall be due and collectable, may be enforced for the whole amount of the debt, if such failure occur.[8] And the same would be the effect if, by the terms of a bond, secured by mortgage, and payable on time, it were to be paid in full if the interest therein reserved

[1] Adams *v.* Brown, 7 Cush. 220; Stewart *v.* Clark, 11 Met. 384.
[2] Sparhawk *v.* Wills, 5 Gray, 423.
[3] Dexter *v.* Arnold, 1 Sumn. 109.
[4] Coote, Mortg. 528.
[5] Robinson *v.* Loomis, 51 Penn. 78.
[6] Tiernan *v.* Hinman, 16 Ill. 403.
[7] Burchard *v.* Frasier, 23 Mich. 40.
[8] Spring *v.* Fiske, 6 C. E. Green, 175.

should not be paid when due.[1] But the non-payment of such instalment is only to be taken advantage of by the mortgagee: the mortgagor could not, by failing to pay the same, treat the debt as due, and, by tendering the whole debt, affect the lien of the mortgagee upon the estate.[2]

21. As has been remarked above, where one of several persons interested in a mortgaged estate redeems it by paying the whole debt, he does not thereby relieve the other [*556] portions of * the estate from the charge, but becomes an equitable assignee of the mortgage as to these parts, and may hold the same as mortgagee until the respective owners thereof shall contribute, *pro rata*, towards the mortgage-debt according to the value of their respective shares of the estate, compared with that of the entire estate.[3] But where two tenants in common join in a mortgage of the common property to secure the debt of one of them, and then the other conveys his share to the mortgagee, it was held, that the one whose debt was secured must pay the whole debt to redeem his share of the estate, and would thereby relieve the other share.[4] Where the purchaser of an equity of redemption paid off the existing mortgages, he was subrogated to the rights of the mortgagees.[5] Where, between a first and second mortgage, a judgment lien has been created upon the estate, and, upon foreclosure of the second mortgage, the purchaser pays the first mortgage, he has the right of the first mortgagee against the judgment creditor.[6] But if, in order to save his estate, a second mortgagee pays the interest falling due upon a prior mortgage-debt, he acquires thereby a lien upon the mortgaged estate in the place of the mortgagee, to the extent of the interest thus paid, but he holds it subject

[1] Harper *v.* Ely, 56 Ill. 179.

[2] Hartley *v.* Tatham, 2 Abb. N. Y. Rep. 337, 339.

[3] 4 Kent, Com. 163; Story, Eq. Jur. § 1023; Gibson *v.* Crehore, 5 Pick. 146; Parkman *v.* Welch, 19 Pick. 231; Salem *v.* Edgerly, 33 N. H. 46; Aiken *v.* Gale, 37 N. H. 505; Towle *v.* Hoit, 14 N. H. 61; Blue *v.* Blue, 38 Ill. 17; Penn *v.* Railway Co., 20 Am. L. Reg. 576; Briscoe *v.* Power, 47 Ill. 449; Wheeler *v.* Willard, 44 Vt. 644.

[4] Crafts *v.* Crafts, 13 Gray, 360.

[5] Warren *v.* Warren, 30 Vt. 530; Walker *v.* King, 44 Vt. 609.

[6] Raymond *v.* Holborn, 23 Wis. 57.

to the prior lien of the mortgage-debt in favor of the mortgagee for all the excess above the interest.[1] But, as will be more fully explained hereafter, this doctrine applies only between parties who stand, in respect to the estate, *in æquali jure;* for if, for instance, a man purchases a part of an estate subject to the entire mortgage, he pays a price accordingly, and has obviously no claim in equity upon any person to contribute towards it.[2] Where a second mortgage was made to three persons, and in order to protect their estate it became necessary to redeem the prior mortgage, and two only of three were willing to do so, it was held, that by so doing they became equitable assignees of such mortgage against their co-mortgagee, and by a bill in equity they might compel him either to contribute towards redeeming the same, or convey his interest in the first mortgage to them.[3]

22. Nor would the purchaser of an equity of redemption sold upon execution be affected as to his right to redeem the estate by the circumstance that the premises were, at the time of such sale, in the possession of a disseisor. The unlawful possession of the land does not affect an incorporeal hereditament existing in respect to it, like an equity of redemption.[4] So where a creditor had set off land of his debtor to satisfy an execution, and had then mortgaged the same to a third person, and the original debtor obtained a reversal of the judgment which had thus been satisfied, it was held that he might, by a process in equity, compel the mortgagee in such mortgage to discharge the same.[5] Where a mortgagor or assignee redeems, he regains his estate just as it existed when he made the mortgage; the operation of the mortgage is defeated by force of the condition; he takes the estate with all the incidents and benefits, and subject to the servitudes, to which it was subject when the mortgage was made; and no lease, charge, or incumbrance made by the mortgagee can be set up against the claims of the mortgagor. The estate is restored

[1] Penn *v.* Railway Co., 20 Am. L. Reg. 576.

[2] Gill *v.* Lyon, 1 Johns. Ch. 447; Clowes *v.* Dickinson, 5 Johns. Ch. 241; Porter *v.* Seabor, 2 Root, 146; Allen *v.* Clark, 17 Pick. 47.

[3] Saunders *v.* Frost, 5 Pick. 259. [4] Thompson *v.* Chandler, 7 Greenl. 377

[5] Delano *v.* Wilde, 11 Gray, 17.

unchanged.[1] Where there are several parties before the court, each claiming the right to redeem the mortgaged estate, the court will decree the redemption according to the priority of the claims of the several parties; namely, the second to redeem the first, the third the second, and so on.[2] And where two estates are included in the same mortgage, and the equities in these devolve upon different persons, if either [*557] wishes to redeem, he should make the * holder of the other equity a party to the bill.[3] And in England, where a mortgagor has given two separate mortgages of two distinct estates to the same mortgagee to secure two distinct debts, equity will not admit of his redeeming one of these without redeeming both.[4] But such is not the law in this country; each mortgage has its own equity of redemption, unaffected by the equity of any other mortgage.[5] If the mortgagor die before redeeming the estate, his heir or assignee becomes the only party who can maintain a process for redemption;[6] and all the heirs should be before the court.[7]

23. In treating more at large upon who must or may be made parties to proceedings to redeem a mortgage, it may be stated generally, that all persons interested in the mortgage, whether as holders, trustees, or otherwise, should be made defendants in a bill to redeem.[8] Thus a mortgagee who has pledged his mortgage must be made a party as well as his pledgee.[9] Thus where the widow of the mortgagor brought a bill to redeem the mortgage, she properly made the owner of the husband's equity a party, since he was interested in the mortgagee's account, for upon her redeeming she became sub-

[1] Ritger *v.* Parker, 8 Cush. 149.

[2] Coote, Mortg. 526; Arcedechne *v.* Bowes, 3 Meriv. 216, n.

[3] Coote, Mortg. 527; Cholmondeley *v.* Clinton, 2 Jack. & Walk. 134.

[4] Pope *v.* Onslow, 2 Vern. 286. [5] Brigden *v.* Carhartt, Hopk. Ch. 234.

[6] Barker *v.* Wood, 9 Mass. 419; Smith *v.* Manning, Id. 422; Elliot *v.* Patton, 4 Yerg. 10; Shaw *v.* Hoadley, 8 Blackf. 165.

[7] 1 Daniels, Ch. Prac. 240, 264, Perkins' ed. and n.; Wolcott *v.* Sullivan, 6 Paige, Ch. 117. But the heirs of the mortgagor need not be made parties to a bill to foreclose a mortgage, by statute in Illinois. Rockwell *v.* Jones, 21 Ill. 279.

[8] 1 Daniel's Ch. Prac. 306, 307; Fisher, Mortg. 187 *et seq.*

[9] Brown *v.* Johnson, 53 Me. 246.

stituted to the place of the mortgagee as against the holder of the husband's equity, with a right to be reimbursed all but her own share of the mortgage-debt that she had paid to redeem.[1] So should purchasers from a mortgagee in possession for condition broken ;[2] though, if a mortgagee shall have assigned his whole interest, he need not be made a party,[3] unless interested in the question of the amount for which the estate is to be held.[4]

24. In Massachusetts, a mortgagor may bring a bill in equity to redeem without a previous tender of the debt. But if the mortgagee have done nothing to prevent the mortgagor performing the condition, he will, in such a proceeding, be entitled to his costs.[5] But in Mississippi the mortgagor must make a tender of the mortgage-debt before he can maintain a bill to redeem.[6]

25. A mortgagor may be barred of his right of redemption * by limitation, where the possession of the [*558] premises has been adverse for twenty years, or a shorter period, conforming to the statute of limitation of the State where the land lies, as where the mortgagee has been in possession during that time without recognizing that he held under his mortgage. In such a case, the law presumes the equity to be extinguished. But no length of time of holding possession by a mortgagee will bar the right of redemption, if the mortgage is treated during that time as a subsisting security for the debt ;[7] and the same would be the result if the mortgagee had entered under an agreement to keep possession till his debt should be paid out of the profits of the estate.[8] So a possession for the requisite period of limitation,

[1] McCabe *v.* Bellows, 1 Allen, 269. [2] Wing *v.* Davis, 7 Greenl. 31.

[3] Wolcott *v.* Sullivan, 1 Edw. Ch. 399.

[4] Doody *v.* Pierce, 9 Allen, 141.

[5] Miller *v.* Lincoln, 6 Gray, 556. For the subject of costs in such cases see Brown *v.* Simons, 45 N. H. 211.

[6] Hoopes *v.* Bailey, 28 Miss. 328.

[7] Dexter *v.* Arnold, 1 Sumn. 109 ; Ayres *v.* Waite, 10 Cush. 72 ; Chick *v.* Rollins, 44 Me. 116 ; Story, Eq. § 1028 ; Tripe *v.* Marcy, 39 N. H. 439 ; McNair *v.* Lee, 34 Mo. 285.

[8] Marks *v.* Pell, 1 Johns. Ch. 594. Upon the general question of a mortgagor's right in equity being barred by limitations, see Hurd *v.* Coleman, 42 Me. 182 ; Blethen *v.* Dwinal, 35 Me. 556 ; Robinson *v.* Fife, 3 Ohio, N. S. 551 ; Jarvis *v.*

under a *de facto* foreclosure, will bar the redemption, though the proceedings in effecting such foreclosure were irregular, unless the mortgagor accounts for the delay in a manner to do away the presumptions of law.[1] Nothing short of an actual possession by the mortgagee will avail him in such case in the way of a bar to the mortgagor's right of redemption.[2] Nor will any length of possession bar the mortgagor's right where the mortgagee enters before condition broken, and holds over, without notice that he does so for the purpose of foreclosure.[3] But if the mortgagor permits the mortgagee to hold the possession for twenty years without any demand to account, and without any admission on his part by word or act that the mortgage is open to redemption, the title of the mortgagee becomes absolute.[4] And where the grantor, in an absolute deed, held an agreement from the grantee authorizing him to redeem the estate when he should find it convenient, but fixing no time, it was held that no length of possession by the mortgagee would bar the mortga-
[*559] gor's right of redemption,[5] and this would apply * to Welsh mortgages. Upon the point of what shall be a recognition by the mortgagee of the mortgagor's rights, so as to rebut the inference to be derived from the unexplained holding of possession by such mortgagee, it has been held, that commencing proceedings to foreclose his mortgage rebuts the presumption of a release by the mortgagor of his right.[6] So any acts recognizing an existing right of redemption, such as stating an account of the profits of the estate in which it is treated as subject to be redeemed, although not

Woodruff, 22 Conn. 548; Morgan *v.* Morgan, 10 Ga. 297; Elmendorf *v.* Taylor, 10 Wheat. 152; Hughes *v.* Edwards, 9 Wheat. 489; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 191; Gordon *v.* Hobart, 2 Sumn. 401; Cromwell *v.* Bank of Pittsburg, 2 Wallace, Jr. 569; New Jersey Stat. Nix. Dig. 1855, p. 436, § 18; Rev. Stat. 1874, p. 445, § 18; Wells *v.* Morse, 11 Vt. 1.

[1] Slicer *v.* Bank of Pittsburg, 16 How. 571.

[2] Bollinger *v.* Chouteau, 20 Mo. 89; Moore *v.* Cable, 1 Johns. Ch. 385.

[3] Goodwin *v.* Richardson, 11 Mass. 469; Newall *v.* Wright, 3 Mass. 138; Scott *v.* McFarland, 13 Mass. 308.

[4] Roberts *v.* Littlefield, 48 Me. 61; Chick *v.* Rollins, 44 Me. 104; Story's Eq. § 1028 a. See Knowlton *v.* Walker, 13 Wis. 264.

[5] Wyman *v.* Babcock, 2 Curtis (C. C.), 386.

[6] Calkins *v.* Calkins, 3 Barb. 305.

done with the mortgagor or his heirs,[1] and a verbal recognition will be sufficient.[2]

26. In some of the States this matter is regulated by statute. Thus in Mississippi, a bill to redeem must be brought within ten years after possession obtained by the mortgagee, or an acknowledgment of the mortgagor's title or right to redeem, made in writing by the mortgagee.[3] In North Carolina, the presumption of a release by the mortgagor arises after ten years from the forfeiture of the mortgage by breach of the condition.[4]

27. On the other hand, there are presumptions in favor of the mortgagor, arising from long-continued possession by him of the mortgaged premises, without paying rent or interest, or admitting the existence of an outstanding mortgage-debt. If this is continued for twenty years after condition broken, it raises the presumption that the debt has been paid and the mortgage redeemed. And a bill for foreclosure on the part of the mortgagee would thereby ordinarily be barred.[5] But it would seem that there *must be something on [*560] the part of the mortgagor showing affirmatively that he does not hold in subordination to the mortgagee's title, in order to have the time of limitation begin to run.[6] Any recognition by the then owner of the equity of redemption during that time, of the existence of the mortgage, would rebut the presumption of the mortgage being barred, even as to subsequent purchasers.[7] Thus, if the mortgagor is not disturbed

[1] Morgan *v.* Morgan, 10 Ga. 297; Hansard *v.* Hardy, 18 Ves. 455; Fairfax *v.* Montague, 2 Ves. 84; Quint *v.* Little, 4 Greenl. 495; Coote, Mortg. 544.

[2] Shepperd *v.* Murdock, 3 Murph. 218.

[3] Rev. Code, 1857, c. 52, art. 3; 1871, c. 45, § 2149.

[4] Rev. Code, 1854, c. 65, § 19; Battle's Rev. 1873, c. 17, § 30.

[5] Story, Eq. Jur. § 1028 b; Roberts *v.* Welch, 8 Ired. Eq. 287; Boyd *v.* Harris, 2 Md. Ch. Dec. 210; Evans *v.* Huffman, 1 Halst. Ch. 354; Haskell *v.* Bailey, 22 Conn. 569; Elkins *v.* Edwards, 8 Ga. 326; Thayer *v.* Mann, 19 Pick. 535; Richmond *v.* Aiken, 26 Vt. 324; Belmont *v.* O'Brien, 2 Kern. 394; Hughes *v.* Edwards, 9 Wheat. 489; Trash *v.* White, 3 Bro. Ch. 291; Blethen *v.* Dwinal, 35 Me. 556; Inches *v.* Leonard, 12 Mass. 379; Giles *v.* Baremore, 5 Johns. Ch. 545; Wms. Real Prop. 374, Am. ed. note; Nevitt *v.* Bacon, 32 Miss. 212, 226; Harris *v.* Mills, 28 Ill. 46; Chick *v.* Rollins, 44 Me. 104; Tripe *v.* Marcy, 39 N. H. 439; Bacon *v.* McIntire, 8 Met. 87.

[6] Boyd *v.* Beck, 29 Ala. 703; 2 Greenl. Cruise, 114, n.

[7] Heyer *v.* Pruyn, 7 Paige, 465; Hughes *v.* Edwards, 9 Wheat. 490; Wright *v.* Eaves, 10 Rich. Eq. 582; Drayton *v.* Marshall, Rice, Eq. 383, 384.

in his possession for twenty years after the debt secured by the mortgage is due, without being called upon to pay principal or interest, the claim is presumed to be barred. But this may be rebutted by a payment of interest or part of the principal in the mean time.[1] And such holding is, at best, only presumptive evidence of the debt being satisfied.[2] But the mortgagor may give to his possession an adverse character by some unequivocal act hostile to the title of the mortgagee, and brought distinctly home to his knowledge; such act, however, must be a clear, open, explicit denial of the mortgagee's title, and a refusal to hold under it, brought home to the knowledge of the mortgagee. And until then, the statute of limitations does not begin to run, and in this the English and American law coincides.[3] In North Carolina, payment is presumed in case of a mortgage after ten years from the time of the last payment.[4] In Mississippi, the mortgagee's remedy in equity to enforce a mortgage is governed by the same rules of limitation as apply to actions at law to recover the debt itself;[5] while by the statute 7 Wm. IV. and 1 Vict. c. 28, a mortgagee may enter or bring a suit in equity upon a mortgage at any time within twenty years after the last payment of the principal or the interest, and mortgages are presumed to be satisfied at the end of twenty years after interest paid or acknowledgment made.[6] The line of distinction between these two classes of decisions, it will be perceived, is this: In the one, the courts apply to the mortgage the same period of limitation which they do to the debt intended to be thereby secured; in the other, they adopt the same rule as to the limitation of a mortgagee's claim under his mortgage as they do to an ordinary claim to lands where there has been an adverse possession. Among the courts which adopt the first rule are those of California, Texas, where a new promise

[1] Howard *v.* Hildreth, 18 N. H. 106.

[2] Cheever *v.* Perley, 11 Allen, 584.

[3] Tripe *v.* Marcy, 39 N. H. 439; Noyes *v.* Sturdivant, 18 Me. 104; Zeller *v.* Eckert, 4 How. 295; Bacon *v.* McIntire, 8 Met. 87; Hall *v.* Surtees, 5 B. & Ald. 687.

[4] Rev. Code, 1854, c. 65, § 19; Battle's Rev. 1873, c. 17, § 30.

[5] Code, 1857, c. 52, art. 4; 1871, c. 45, § 2150. And the same rule is adopted in Kansas, Chick *v.* Willetts, 2 Kans. 384.

[6] Wms. Real Prop. 373, 374.

to pay the debt revives the mortgage lien, and Illinois.[1] In Illinois, the debt being the principal thing, a mortgage cannot be enforced by ejectment or bill of foreclosure after the debt has been barred by the statute of limitation.[2] A holder under a second mortgage may, after the same has been foreclosed, avail himself of the statute of limitations against the first mortgagee.[3] But the other rule is by far the most generally adopted.[4] The purchaser of a mortgagor has the same right to avail himself of the bar of the statute of limitations as the mortgagor himself would have had.[5] But in all the courts, the time from which the period of limitation is reckoned is the breach of the condition of the mortgage. And, in respect to this, questions have sometimes arisen, especially in respect to mortgages given for indemnity to sureties of the mortgagor as to what is to be regarded as such breach. And it seems now to be settled, that the statute begins to run from the time the party indemnified actually pays the money, and not from the time when he becomes liable to pay it.[6] A statute foreclosure, obtained after the expiration of twenty years, rebuts the presumption of payment arising from the lapse of time,[7] and evidence for the same purpose was allowed, showing the mortgagor to have been a near relative of the mortgagee, and embarrassed in his circumstances.[8]

28. Where a mortgage is once made to secure the payment of a debt, the lien attaches in favor of such debt, nor will any change of form of the indebtedness discharge it short of an actual payment, satisfaction, or release. The giving of a new

[1] Lord *v.* Morris, 18 Cal. 482; Perkins *v.* Sterne, 23 Texas, 563; Harris *v.* Mills, 28 Ill. 44; Grattan *v.* Wiggins, 23 Cal. 34; Cunningham *v.* Hawkins, 24 Cal. 409.

[2] Medley *v.* Eliot, 62 Ill. 532.

[3] Coster *v.* Brown, 23 Cal. 142.

[4] Heyer *v.* Pruyn, 7 Paige, 465, 470, overruling an intimation to the contrary of Sutherland, J., in Jackson *v.* Sackett, 7 Wend. 97; Wilkinson *v.* Flowers, 37 Miss. 585; Nevitt *v.* Bacon, 32 Miss. 226; Reed *v.* Shepley, 6 Vt. 602; Belknap *v.* Gleason, 11 Conn. 160; Fisher's Ex'rs *v.* Mossman, 11 Ohio St. 42; Thayer *v.* Mann, 19 Pick. 535; Ozmun *v.* Reynolds, 11 Minn. 459.

[5] McCarthy *v.* White, 21 Cal. 495; Low *v.* Allen, 26 Cal. 144; Lent *v.* Shear, 26 Cal. 365; Caufman *v.* Sayre, 2 B. Mon. 206.

[6] Duncan *v.* McNeill, 31 Miss. 704; Powell *v.* Smith, 8 Johns. 249; Rodman *v.* Hedden, 10 Wend. 500. See *post*, *599.

[7] Jackson *v.* Slater, 5 Wend. 295.

[8] Wanmaker *v.* Van Buskirk, Saxton, N. J. 685.

note for the original one, though of a different date and for a different amount, and running to a different person, unless intended as a payment of the original note, will not affect the mortgage lien.[1] So where the indorser of a note made a mortgage to the indorsee to secure the payment of it, and the indorsee failed to give the indorser the notice requisite to charge him as indorser, it was held not to affect his security under his mortgage.[2] But if the holder of a note secured by a mortgage fraudulently alter the same, it defeats his claim under the mortgage.[3] Where, however, a mortgagor, having made a mortgage to secure a larger note, made a new one to the mortgagee, and agreed that it should be secured by the mortgage, and if paid should be allowed towards and in payment of the larger note which remained unchanged, it was held that such agreement did not create any lien by means of the mortgage upon the premises.[4] So a bond of a different date, and of a less sum than that described in the mortgage, may be substituted for it, and thereby secured, and this may be shown by parol.[5] So a renewed note attaches to it the incidental security which the original had.[6] But where J. S., holding the note of A. B., took a mortgage from C. D. to secure the payment of it, and, at its maturity, J. S. gave up the note to A. B., and took a new note from him for the same, it was held that he thereby discharged his claim under the mortgage, and that the same was not a security for the renewed note.[7] But if a mortgagor, to secure a debt due the mortgagee, make a mortgage for the amount of the origi-

[1] Green *v.* Hart, 1 Johns. 580; Heard *v.* Evans, 1 Freem. Ch. 79; Davis *v.* Maynard, 9 Mass. 242; Elliot *v.* Sleeper, 2 N. H. 525; Pomroy *v.* Rice, 16 Pick. 22; Dana *v.* Binney, 7 Vt. 493; Watkins *v.* Hill, 8 Pick. 522; Fowler *v.* Bush, 21 Pick. 230; Williams *v.* Starr, 5 Wis. 548; Dillon *v.* Byrne, 5 Cal. 455, 457; Barker *v.* Bell, 37 Ala. 359; Donald *v.* Hewitt, 33 Ala. 533; Chase *v.* Abbott, 20 Iowa, 154; Parkhurst *v.* Cummings, 56 Me. 159; Port *v.* Robbins, 35 Iowa, 208.

[2] Mitchell *v.* Clark, 35 Vt. 104.

[3] Vogle *v.* Ripper, 34 Ill. 106.

[4] Grafton Bank *v.* Foster, 11 Gray, 265.

[5] Baxter *v.* McIntire, 13 Gray, 168.

[6] Cleveland *v.* Martin, 2 Head, 128; Boswell *v.* Goodwin, 12 Am. Law Reg. 79. See also Bank *v.* Rose, 1 Strob. Eq. 257; Pond *v.* Clarke, 14 Conn. 334; Rogers *v.* Traders' Ins. Co., 6 Paige, 583.

[7] Ayers *v.* Watson, 57 Penn. St. 360, 363.

nal note, it would hold good for that amount, though it may have been renewed for a larger sum than the original: the mortgage secures the debt, not the specific note.[1] Nor will the giving of a recognizance as a substitute for such note affect the security, nor the recovering of a *judg- [*561] ment for the original debt, or a commitment of the debtor to jail thereon, and discharge from such imprisonment.[2] A discharge of the remedy for a debt by its being barred by the statute of limitations does not discharge the mortgage.[3] Nor does a decree of discharge of the debtor, under an insolvent process, from the payment of a debt secured by a mortgage, discharge the mortgage lien.[4] A mortgage is not discharged by the mortgagor becoming executor[5] or administrator of the mortgagee.[6] Nor would it be, though the mortgagor accepted a deposit to the amount of the debt,[7] unless he makes use of the same.[8] If a mortgagor suffers the land to be sold for taxes, and purchases in the title himself, he still holds it subject to the mortgage.[9] And the taking by the mortgagee of a new note and mortgage of the same land for the same debt does not discharge his prior mortgage.[10] After the payment of the mortgage-debt, the mortgage is *functus officio;* it cannot be revived by a parol agreement to

[1] Boxheimer *v.* Gunn, 24 Mich. 376.

[2] Cary *v.* Prentiss, 7 Mass. 63. See also, to the general proposition that payment or release alone discharges a mortgage, Euston *v.* Friday, 2 Rich. S. C. 427; Dunshee *v.* Parmelee, 19 Vt. 172; McDonald *v.* McDonald, 16 Vt. 630; Smith *v.* Prince, 14 Conn. 472; Pond *v.* Clark, Id. 334; Brinckerhoff *v.* Lansing, 4 Johns. Ch. 65; M'Cormick *v.* Digby, 8 Blackf. 99; Hadlock *v.* Bulfinch, 31 Me. 246; New Hampshire Bank *v.* Willard, 10 N. H. 210; Cullum *v.* Branch Bank, 23 Ala. 797; Boyd *v.* Beck, 29 Ala. 703; Ledyard *v.* Chapin, 6 Ind. 320; Markell *v.* Eichelberger, 12 Md. 78; Seymour *v.* Darrow, 31 Vt. 122; Gault *v.* McGrath, 32 Penn. St. 392; Applegate *v.* Mason, 13 Ind. 75; Jordan *v.* Smith, 30 Iowa, 500; Hamilton *v.* Quimby, 46 Ill. 90.

[3] Thayer *v.* Mann, 19 Pick. 535; Miller *v.* Helm, 2 S. & M. 687; Bush *v.* Cooper, 26 Miss. 599; Bank of Metropolis *v.* Guttschilk, 14 Pet. 19; Richmond *v.* Aiken, 25 Vt. 324; Pratt *v.* Huggins, 29 Barb. 277; Fisher *v.* Mossman, 11 Ohio St. 42; Joy *v.* Adams, 26 Me. 333; Elkins *v.* Edwards, 8 Ga. 326; Ball *v.* Wyeth, 8 Allen, 278.

[4] Luning *v.* Brady, 10 Cal. 265.

[5] Miller *v.* Donaldson, 17 Ohio, 264.

[6] Kinney *v.* Ensign, 18 Pick. 232; De Forest *v.* Hough, 13 Conn. 472.

[7] Howe *v.* Lewis, 14 Pick. 329.

[8] Toll *v.* Hiller, 11 Paige, Ch. 228.

[9] Frye *v.* Bank of Illinois, 11 Ill. 367.

[10] Smith *v.* Stanley, 37 Me. 11; Boyd *v.* Beck, 29 Ala. 703.

keep it in force in order to secure another debt or liability.[1] But where the mortgagee was induced by fraud to give up his note and mortgage to the mortgagor, and take a new note that was worthless, he was allowed to pursue his remedy upon his mortgage as being still valid.[2] And this against a purchaser from the mortgagor, who had paid up a second mortgage made by the mortgagor under such circumstances as would have given the holder of that mortgage a preference over the first, the first mortgage still standing uncancelled on the record, of which the purchaser was bound to take notice.[3] So where the mortgagee assigned his mortgage, and indorsed the mortgage-note to a third person, but, before it was recorded, purchased it back, and the indorser reindorsed it and erased the assignment, it was held to restore the mortgagee to his original rights.[4] So where A gave a deed to B and C, and took back a mortgage from them for the purchase-money, which mortgage was recorded, and then, at the request of B, A took back his deed, which had not been recorded, and made a new deed to a *bona fide* purchaser cognizant of the facts, and A gave up his mortgage and note to B, and the same were destroyed, but C afterwards objected, and insisted upon claiming the land, he having taken no part in the transaction of cancelling the first deed, it was held that, as to C's half of the estate, the mortgage of B and C was not cancelled or affected by the act of A and B in destroying the deed and note.[5] On the other hand, if the mortgagor pay the debt, he cannot, by having it assigned to him, keep it alive as against a junior incumbrancer, though he obtain a new loan, and assign the first mortgage as a security therefor.[6] And if a mortgage be made by A for the benefit and debt of B, and

[1] Mead *v.* York, 2 Seld. 449. See Claflin *v.* Godfrey, 21 Pick. 1; Joslyn *v.* Wyman, 5 Allen, 62, how far good between the parties; Hunter *v.* Richardson, 1 Duval (Ky.), 247; Brooks *v.* Ruff, 37 Ala. 374; Abbott *v.* Upton, 19 Pick. 434; Bonham *v.* Galloway, 13 Ill. 68; Kellogg *v.* Ames, 41 Barb. 218.

[2] Grimes *v.* Kimball, 3 Allen, 518; Joslyn *v.* Wyman, 5 Allen, 63; Eyre *v.* Burmester, 10 H. L. Cas. 90.

[3] Grimes *v.* Kimball, 8 Allen, 153.

[4] Howe *v.* Wilder, 11 Gray, 267.

[5] Lawrence *v.* Stratton, 6 Cush. 163.

[6] Angel *v.* Boner, 38 Barb. 429; Harbeck *v.* Vanderbilt, 20 N. Y. 395; Champney *v.* Coope, 34 Barb. 544.

the latter pay the debt, being the real debtor, it would as effectually discharge the mortgage as if the payment had been made by A, nor would an assignment by the mortgagee to B make it valid in his hand.[1] But where the mortgage was assigned to the mortgagor by mistake, his assignment was held to pass it to the real assignee as a valid instrument. Thus A having made his bond and mortgage to B, and, B wishing his money, A procured C to advance it to B, with a view of his having the bond and mortgage assigned to him. Instead of that they were assigned to A, and by him to C; and it was held that A was but the agent of B and C in transacting the business, and that C was clothed with B's rights as mortgagee.[2] And in Robinson *v.* Urquhart, it was held that if a mortgagor pay a mortgage-debt, and there be no intervening incumbrance, he may use the mortgage again to secure a new creditor; and where the real mortgage-debt had been actually paid off, another creditor may have the right of substitution or subrogation, and the mortgage may be appropriated to secure a debt to which in its origin it had no reference whatever. This doctrine is stated as from authority of cases cited, the leading one of which (Starr *v.* Ellis) contains dicta favoring in some measure such view of the law, but was decided the other way. A similar doctrine was favored by McCoun, V. Chancellor, in Purser *v.* Anderson, but the point was not decided. It seems to be opposed to the general tenor of numerous cases, and was expressly denied to be law in Merrill *v.* Chase: "A reissue of the note for a valuable consideration could not afterwards convey a title to the land without a new conveyance in mortgage by deed."[3] So parol evidence is inadmissible, except for the purpose of proving fraud, to show that an express assignment of a mortgage was intended to be a discharge, even though offered by a third party.[4]

[1] Champney *v.* Coope, *sup.*

[2] Angel *v.* Boner, 38 Barb. 429, 430. See Starr *v.* Ellis, 6 Johns. Ch. 392.

[3] Robinson *v.* Urquhart, 1 Beasley (N. J.), 524; Starr *v.* Ellis, 6 Johns. Ch. 392; Purser *v.* Anderson, 4 Edw. Ch. 17, 20; Merrill *v.* Chase, 3 Allen, 339; Joslyn *v.* Wyman, 5 Allen, 63.

[4] Howard *v.* Howard, 3 Met. 548; Tyler *v.* Taylor, 8 Barb. 585.

29. That a mortgage has been paid, however, may [*562] always * be proved by parol,[1] or may be inferred from facts and circumstances proved;[2] though even the possession by the mortgagor of the notes secured by the mortgage may be explained, and any presumption of payment therefrom rebutted.[3] And an entry of satisfaction upon the record, or one made under the seal of the mortgagee, is, as between the original parties, only *prima facie* evidence of payment, and may be explained and controlled.[4] But where a mortgagee negotiated the note secured by his mortgage to a third person, and then entered a satisfaction of his mortgage upon the record, a *bona fide* purchaser, not cognizant that the note was unpaid and the entry of satisfaction unauthorized, was entitled to hold against the holder of the note.[5] And it is competent for the court to declare a discharge made on the records, which was made by mistake, a nullity.[6] Such is the law in New York. But where the administrator of a mortgagee assigned a mortgage and debt to a *bona fide* purchaser, and subsequently discharged the mortgage upon the record without the knowledge of the assignee, it was held to be void as to him, and as to all persons except subsequent incumbrancers, who become such upon the faith of the record of the discharge. Had the assignment been recorded before such discharge, it would have had no effect upon the validity of the mortgage, nor would it have let in any subsequent incumbrancer to take in precedence of such mortgage.[7] And in Joslyn *v.* Wyman, a mortgagor having paid the notes originally secured by the mortgage, he, for a new consideration, made notes answering to those given up, and agreed that the mortgagee should hold the mortgage to secure them. The mortgagor then conveyed the estate to another, having full knowledge of the transac-

[1] Den *v.* Spinning, 1 Halst. 471; Ackla *v.* Ackla, 6 Penn. St. 228; McDaniels *v.* Lapham, 21 Vt. 222; Thornton *v.* Wood, 42 Me. 282.

[2] Waugh *v.* Riley, 8 Met. 290; Morgan *v.* Davis, 2 Harr. & McH. 9; Deming *v.* Comings, 11 N. H. 474.

[3] Smith *v.* Smith, 15 N. H. 55; Crocker *v.* Thompson, 3 Met. 224.

[4] Fleming *v.* Parry, 24 Penn. St. 47; Trenton Banking Co. *v.* Woodruff, 1 Green, Ch. 117; Robinson *v.* Sampson, 23 Me. 388.

[5] Cornog *v.* Fuller, 30 Iowa, 212. [6] Bruce *v.* Bonney, 12 Gray, 113.

[7] Ely *v.* Scofield, 35 Barb. 330. See Swartz *v.* Leist, 13 Ohio St. 419.

tion, who applied to the court to obtain a discharge of the mortgage. But the court held, that though the transaction and agreement did not attach the new notes to the mortgage so as to make it a security for them to be enforced as a mortgage, or give it validity against an attaching creditor, a second mortgagee, or *bona fide* purchaser, yet it laid the ground for refusing aid as a court of equity, and for leaving the parties to their legal rights, though the court do not define what those were.[1] Where the discharge of a mortgage has been obtained by fraud, equity may treat the discharge as a nullity, and revive the mortgage.[2] A mortgagee may discharge the mortgage security upon the estate without affecting the debt itself as such.[3] *

30. Questions sometimes arise, whether a given transaction in respect to a mortgage operates as an assignment or a discharge. These more frequently arise in cases where the widow of a mortgagor claims dower, though they may arise between other claimants of the premises. The following case, with the language of the court in deciding it, will illustrate the remark: Brown made a mortgage, in which his wife joined. He subsequently became insolvent, and his estate passed to his assignees. The mortgage came by assignment to one G. On the 12th of *January, the assignees, by [*563] a previous arrangement to that effect with the mort-

* Note. — In many of the States there is a provision made for a ready mode of discharging mortgages by a brief certificate to that effect entered upon the record in the register's office. Among these are California, Dig. Stat. 1858, p. 801; Code, 1872, p. 871; Maine, Rev. Stat. 1867, c. 90, § 26; 1871, c. 90; Missouri, Rev. Stat. 1855, c. 113, § 21; 1872, c. 99; Mississippi, Rev. Code, 1857, c. 36, art. 14; 1871, c. 52; Ohio, Rev. Stat. 1854, c. 34, § 18; 1860, vol. 1, p. 471; Swartz *v.* Leist, 13 Ohio St. 419; New York, Rev. Stat. 1852, vol. 2, p. 170; Stat. at Large, 1863, vol. 1, p. 713; Iowa, Code, 1851, § 2093; 1873, p. 532; Illinois, Comp. Stat. 1857, vol. 2, p. 976; Rev. Stat, 1874, c. 95, § 8; Arkansas, Dig. 1858, p. 801; Massachusetts, Gen. Stat. c. 89, § 30; Stat. 1868, c. 187; Iowa, Waters *v.* Waters, 20 Iowa, 366. In Massachusetts, if mortgagee, upon satisfaction of his debt, refuse to enter a proper discharge upon the record, he is liable in damages to the mortgagor. And a similar law prevails in Missouri. Verges *v.* Giboney, 47 Mo. 171.

[1] Joslyn *v.* Wyman, 5 Allen, 62. See also Stone *v.* Lane, 10 Allen, 74; *ante*, *541.

[2] Barnes *v.* Camack, 1 Barb. 392.

[3] Sherwood *v.* Dunbar, 6 Cal. 53.

gagee, and to pay him out of the proceeds, sold the entire estate to one D., and on the same day paid G. the amount of the mortgage, and took an assignment thereof to themselves, but did not deliver their deed of the estate to D. till February 11th. At a subsequent period, the assignees made an assignment to D. of the mortgage. Brown having died, his wife claimed dower on the ground that the transaction was a payment to the mortgagee of his debt, and understood and intended as such, and that she was thereby let in to claim dower, not in the equity of redemption alone, but in the land itself. The court, Shaw, C. J., say: "Whether a given transaction shall be held in legal effect to operate as a payment and discharge which extinguishes the mortgage, or as an assignment which preserves and keeps it on foot, does not so much depend upon the form of words used, as upon the relation subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such assignment shall be held to constitute an extinguishment or an assignment according to the intent of the parties, and their respective interests in the subject will have a strong bearing upon the question of such intent." The transaction was held to constitute an assignment.[1] The language of the court in another case was, "If the release is to a party whose duty it is to extinguish the mortgage for the benefit of another, it will be held to operate as a discharge."[2]

[1] Brown *v.* Lapham, 3 Cush. 554, 555. And see Eaton *v.* Simonds, 14 Pick. 98; Robinson *v.* Urquhart, 1 Beasley (N. J.), 515; Swift *v.* Kraemer, 13 Cal. 526; Wedge *v.* Moore, 6 Cush. 8; Bolton *v.* Ballard, 13 Mass. 227; Kilborn *v.* Robbins, 8 Allen, 471; Strong *v.* Converse, 8 Allen, 559, *ante*, p. *528.

[2] Wadsworth *v.* Williams, 100 Mass. 131.

SECTION VI.

MERGER OF INTEREST.

1–3. In what cases the interests of mortgagor and mortgagee merge.
4. Redemption passes the acquisitions of the mortgagee.

1. It sometimes happens that the interests of mortgagor and mortgagee come together in one and the same person, and * then a question often arises whether the [*564] two have become merged in one, or remain still distinct interests. It is generally true, that whenever a legal and equitable estate in the same land come, to one person in the same right, without an intervening interest outstanding in a third person, the equitable merges in the legal estate, and the latter alone remains subsisting. But in order to work a merger, the mortgagee must be the holder of the mortgage at the time he acquires the estate of the mortgagor. If he has parted with that, there would be no merger by his coming into the place of the mortgagor.[1] In applying this principle to mortgages, it makes no difference whether the mortgagor or his assigns pay off the mortgage or take an assignment of it, or the mortgagor conveys to the mortgagee by an absolute deed.[2] Such merger extinguishes the mortgage-debt, and the mortgage can no more be set up than if it had been fully paid.[3] This proposition, however, is qualified by more recent cases to this extent; viz., if the mortgagee conveys to the mortgagor, it will be presumed to be a satisfaction and release of the mortgage. But if the conveyance be by a mortgagor to the mortgagee, where there is a junior incumbrance upon the estate, the interest of the first mortgagee, as such, would not be affected by such a union of interests in the mortgagee. Whether it shall work a merger depends upon whether such is

[1] White *v.* Hampton, 13 Iowa, 259.

[2] Gardner *v.* Astor, 3 Johns. Ch. 53; Starr *v.* Ellis, 6 Johns. Ch. 393; James *v.* Johnson, 6 Id. 417; Barnet *v.* Denniston, 5 Johns. Ch. 35; Tud. Cas. 772, 773; Wilhelmi *v.* Leonard, 13 Iowa, 330; James *v.* Morey, 2 Cow. 300, 313.

[3] Gregory *v.* Savage, 32 Conn. 264; Bassett *v.* Mason, 18 Conn. 131; James *v.* Morey, 2 Cow. 246, 286.

for the interest of the mortgagee.[1] If there be two owners of an equity of redemption, and the mortgage be conveyed or assigned to one of them, the mortgage is not thereby merged; it remains in force, and may be foreclosed by the assignee against his co-tenant of the equity, or the latter may redeem his interest in the estate by paying one-half of the mortgage-debt before foreclosure.[2] So if a mortgagee assign his mortgage, and then buys the equity of redemption, it does not merge the mortgage, though the assignment be not recorded.[3] But if, nevertheless, it is for the interest of the mortgagee that the two estates should not merge, equity will suffer what it assumes the intention of the mortgagee to be, that no merger takes place, and preserves the rights of each distinct.[4] The purchaser of an equity of redemption may take an assignment of the mortgage, and may keep the legal and equitable titles distinct, at his election, if he has any interest in so doing, so that they shall not merge by unity of possession. And a release of an equity of redemption operates as an extinguishment of the equity of redemption, and not as a merger of the estate conveyed by the mortgage.[5] This can be best illustrated by a reference to decided cases, with the additional explanation, that, in order to work a merger, the new estate created by the union of the two, out of which it is formed, must be a permanent one, and not defeasible in its nature. Thus where a right of way over one parcel belonged as appurtenant to another, and the same person acquired separate mortgages of these two parcels from separate mortgagors, it was held not to work a merger of the easement until they should have been foreclosed; for had either mortgagor redeemed his parcel, it would come back to him with the existing easement or servitude.[6] In another case, one purchased an equity of redemption in an estate, and then

[1] Edgerton *v.* Young, 43 Ill. 464; Staunton *v.* Thompson, 49 N. H. 272.

[2] Baker *v.* Flood, 103 Mass. 47.

[3] Campbell *v.* Vedder, 1 Abb. N. Y. Decis. 295.

[4] James *v.* Morey, *sup.* 285, 300, 318; Lockwood *v.* Sturdevant, 6 Conn. 374; Mallory *v.* Hitchcock, 29 Conn. 135; Savage *v.* Hall, 12 Gray, 365.

[5] Clary *v.* Owen, 15 Gray, 525; Loud *v.* Lane, 8 Met. 517; Lyon *v.* McIlvain, 24 Iowa, 12; Shin *v.* Fredericks, 56 Ill. 443.

[6] Ritger *v.* Parker, 8 Cush. 145, 149; Hancock *v.* Carlton, 6 Gray, 39, 50.

mortgaged it. He then purchased in the first mortgage; but it was held not to operate a merger in him, because of the intermediate outstanding mortgage created by him.[1] But where an equity of redemption was conveyed to a wife, and the holder of the mortgage assigned his mortgage which came by sundry mesne assignments to the wife, who failed to put her assignment on record, and her immediate assignor then made a second assignment to a third person, who put the same upon record, the court intimated the opinion, that by the assignment to the wife the interests were merged, and that the second assignment by her assignor was of no effect.[2] But an assignment by a mortgagee of his mortgage to the wife of the mortgagor does not operate as a discharge of the same.[3] If the one paying the debt have only an estate defeasible under an executory devise, it will not work a merger.[4] And where it is for the interest of the holder of one of these titles, upon his acquiring the other, that they should be kept distinct in order that both should be protected, they will not be held to merge, unless the contrary intent appears from the language of the deed; as where, for instance, the purchaser of an equity of redemption pays an outstanding mortgage, made by his grantor, in which his wife had released dower, the mortgage will not be deemed to be merged, as it would let in the widow to her full right of dower.[5] And it may be stated as a general principle, that although, where the mortgagee purchases in the equity, he thereby extinguishes his debt and mortgage, it will not be so regarded if he has been induced by fraud to give up his debt, or it is necessary for the protection of his interest that the estates should be

[1] Evans *v.* Kimball, 1 Allen, 240; Cook *v.* Brightly, 46 Penn. 439.

[2] Pickett *v.* Barron, 29 Barb. 508.

[3] Bean *v.* Boothby, 57 Me. 295.

[4] Fisher, Mortg. 447.

[5] See the cases above cited. Forbes *v.* Moffat, 18 Ves. 384; Hunt *v.* Hunt, 14 Pick. 374; Gibson *v.* Crehore, 3 Pick. 475; Eaton *v.* Simonds, 14 Pick. 98; Hatch *v.* Kimball, 14 Me. 9; St. Paul *v.* Dudley, 15 Ves. 167; Brown *v.* Lapham, 3 Cush. 551; Grover *v.* Thatcher, 4 Gray, 526; Casey *v.* Buttolph, 12 Barb. 637; Bell *v.* Woodward, 34 N. H. 90; Johnson *v.* Johnson, Walker, Ch. 331; Dutton *v.* Ives, 5 Mich. 515; Thompson *v.* Chandler, 7 Me. 377; Holden *v.* Pike, 24 Me. 437; Fletcher *v.* Chase, 16 N. H. 42, 43; James *v.* Morey, 2 Cow. 285, 300; N. E. Jewelry Co. *v.* Merriam, 2 Allen, 392; Savage *v.* Hall, 12 Gray, 364, 365.

kept distinct. In such cases the doctrine of merger does not apply. Thus, where the mortgagee purchased in the equity, but it afterwards appeared that there was a judgment lien upon it in favor of a creditor of the mortgagor, it was held not to merge the mortgage so as to let in this lien upon the estate of the mortgagee.[1] But where a third mortgagee paid the first, and took a deed of release in express terms discharging the same, it was held, that he could not set up the first mortgage against the claim of the second mortgagee.[2]

2. The question in such cases becomes one of intention, and the interests will not merge, unless the law finds such to be the intention of the person in whom they meet, expressly declared or clearly to be inferred from such merger being to his advantage.[3] Thus where a mortgagee purchased of the mortgagor his equity of redemption, and gave up his note secured by the mortgage, it was held not to operate as a merger as against an intervening attachment and levy for the debt of the mortgagor, it not being intended as a payment of the mortgage-debt, and the mortgage not having been actually discharged.[4]

[*565] * 3. In order to a merger, the two interests must unite in one and the same person, in the same right at the same time.[5] Wherefore a mortgagee, having occasion to purchase the equity of redemption, may always keep alive the mortgage by taking a conveyance of the equity to a trustee.[6] So where the mortgagor applied to a third person to loan him money, upon an agreement that he should have the mortgage on his estate then outstanding as his security,

[1] Vannice *v.* Bergen, 16 Iowa, 562; Wickersham *v.* Reeves, 1 Iowa, 413; Lyon *v.* McIlvaine, 24 Iowa, 12.

[2] Wade *v.* Howard, 6 Pick. 492, s. c. 11 Pick. 289; Frazee *v.* Inslee, 1 Green, Ch. 239.

[3] Knowles *v.* Lawton, 18 Ga. 476; Waugh *v.* Riley, 8 Met. 290; Loud *v.* Lane, Id. 517; Van Nest *v.* Latson, 19 Barb. 604; Hutchins *v.* Carleton, 19 N. H. 487; Den *v.* Brown, 2 Dutch. N. J. 196; Loomer *v.* Wheelwright, 3 Sandf. Ch. 157. See Walker *v.* Barker, 26 Vt. 710.

[4] N. E. Jewelry Co. *v.* Merriam, 2 Allen, 390.

[5] Pratt *v.* Bank of Bennington, 10 Vt. 293; Sherman *v.* Abbot, 18 Pick. 448.

[6] Bailey *v.* Richardson, 15 E. L. & Eq. 218, s. c. 9 Hare, 734; Fisher, Mortg. 450.

and the money was furnished as a loan, and was delivered to the mortgagor, who paid it to the mortgagee and had the mortgage assigned in blank, it was held not to work a merger in the mortgagor's hands as against the one making the loan.[1] And it may be laid down as universally true, that, where a mortgage has been substantially satisfied, it will never be kept alive by equity to aid in perpetrating a fraud through the forms of law, but only for the advancement of justice.[2]

4. If a mortgagee, as such, while in possession of an estate, acquires any rights or advantages in respect to the same, and the mortgagor redeems from him, the latter thereby acquires to himself the benefit of these advantages. As, for instance, where the mortgagee of a term had acquired for himself a renewal of the lease in his own name, it was held, that the mortgagor, by redeeming the mortgage, acquired the benefit of such renewal. In this respect, mortgagees stand in the relation of trustees to the estate as to deriving personal advantage out of it.[3]

SECTION VII.

OF THE PERSONAL RELIEVING THE REAL ESTATE.

1. When heirs may call on executors to redeem.
2. How far devisees or purchasers may.
3. The personal not called in aid of the real estate in insolvency.
4. When the heir or his vendee may not call for aid.
5. Purchasers of a mere equity may not claim relief.

1. QUESTIONS often arise between parties interested in the estates of mortgagors as to when and how far their personal estate shall contribute to relieve the real by satisfying outstanding mortgages. In general it may be assumed, where there is no specific legislation upon the subject, that an heir

[1] Champney *v.* Coope, 32 N. Y. 543.

[2] McGiven *v.* Wheelock, 7 Barb. 22; Hinchman *v.* Emans, Saxton, 100; Hutchins *v.* Carleton, 19 N. H. 487.

[3] Holridge *v.* Gillespie, 2 Johns. Ch. 30; Slee *v.* Manhattan Co., 1 Paige, Ch. 48.

at law of a mortgagor may call upon the executor or
[*566] administrator to *discharge the mortgage upon the real out of the personal estate, on the ground that the personal estate had the benefit of the money for the security of which the mortgage was given, and *qui sentit commodum sentire debet et onus*, or "that that should have the satisfaction that sustained the loss;"[1] and this was extended to a widow in favor of her dower, in an estate mortgaged to secure the purchase-money;[2] though the holder of the mortgage is affected by no such consideration, and is not obliged to seek his satisfaction out of the personal estate.[3]

2. So, as a general proposition, a devisee of the real estate stands, in this respect, in the situation of an heir.[4] But the principle is adopted in favor of these alone, and only against executors, administrators, and residuary legatees, or next of kin of such mortgagor. It does not avail against legatees, general or specific, nor against creditors.[5] Nor have devisees of mortgaged property a right to call on executors to redeem as against devisees of other property.[6]

3. If the estate of a deceased mortgagor be insolvent, the courts will not apply the personal to relieve the real estate.[7] Nor can an executor or administrator be compelled to apply personal assets found in one State to relieve real estate situate in another jurisdiction.[8] But where an administrator, not

[1] 2 Crabb, Real Prop. 914; Cope *v.* Cope, 2 Salk. 449, and cases cited in the note. Broom's Maxims, 560.

[2] Henagan *v.* Harllee, 10 Rich. Eq. 285.

[3] Trustees *v.* Dickson, 1 Freem. (Miss.) Ch. 474; Patton *v.* Page, 4 Hen. & M. 449.

[4] Goodburn *v.* Stevens, 1 Md. Ch. Dec. 420; Cumberland *v.* Codrington, 3 Johns. Ch. 229; King *v.* King, 3 P. Wms. 358; Lanoy *v.* Athol, 2 Atk. 444; 2 Crabb, Real Prop. 914. Though the real estate be devised subject to payment of debts. Lupton *v.* Lupton, 2 Johns. Ch. 614; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Ancaster *v.* Mayer, 1 Bro. Ch. 454; Lockhart *v.* Hardy, 9 Beav. 379. Unless the real estate be directed to be sold to pay debts, and the personal be expressly bequeathed. 1 Story, Eq. Jur. 572.

[5] Coote, Mortg. 467, 468; Cope *v.* Cope, 2 Salk. 449; Torr's Estate, 2 Rawle, 250; Mansell's Estate, 1 Parsons, Eq. Cas. 367; Adams, Eq. Jur. 3d Am. ed. 274, n.

[6] Gibson *v.* McCormick, 10 Gill & J. 65; Mason's Estate, 1 Parsons, Eq. Cas. 129, s. c. 4 Penn. St. 497.

[7] Gibson *v.* Crehore, 3 Pick. 475. [8] Haven *v.* Foster, 9 Pick. 112.

knowing the land of his intestate to be under a mortgage, sold it by leave of court as unincumbered, he was allowed to apply enough of the proceeds to satisfy the outstanding mortgage upon the same, it being the only way in which he was able to make a good title to the estate.[1]

*4. If an heir sell an equity of redemption that [*567] descends to him, without exercising his common-law right to have the mortgage paid out of the personal estate, he cannot afterwards call upon that for relief or aid.[2] And the rule in New York is, in all cases, that, where a mortgaged estate descends to an heir or passes to a devisee, he takes it charged with the mortgage, and is to satisfy it, unless there be, in the case of a devise, an express direction to the contrary.[3] Nor will a general direction to pay the testator's just debts be sufficient, under their statute, to throw the mortgage-debt upon the personalty.[4]

5. It may, moreover, be stated as a general proposition, that wherever the holder of an equity of redemption has acquired it by purchase, in the popular sense of that term, he takes it for what it is, — a mere right to become possessed of the estate by paying the incumbrance upon it, and that alone is what he has paid for. He has no right in equity to call upon any other fund to relieve his own estate. Thus, where a testator purchased an estate subject to a mortgage, and made a personal agreement with the mortgagor to pay the debt, and then devised the estate, it was held that the debt was a charge upon the real estate only, and the devisee could not call on the personal estate to relieve it.[5] And though the rule of the common law is as above stated, that, where the mortgagor himself contracts the debt, the mortgage is collateral to the debt, and the personal is bound to relieve it; yet, if the original debt was that of another, the testator, by devising the

[1] Church *v.* Savage, 7 Cush. 440.

[2] Haven *v.* Foster, 9 Pick. 112.

[3] Mosely *v.* Marshall, 27 Barb. 42; Lalor, Real Est. 308. See a similar statute, 17 & 18 Vict. c. 113; Fisher, Mortg. 398; Wright *v.* Holbrook, 32 N. Y. 587, though otherwise with a vendor's lien; 2 Story, Eq., Redfield's ed., § 1248 c.

[4] Rapalye *v.* Rapalye, 27 Barb. 610.

[5] Cumberland *v.* Codrington, 3 Johns. Ch. 229; Tweddell *v.* Tweddell, 2 Bro. Ch. 101.

estate, does not charge the payment of the debt upon his personal estate, unless he does so expressly by his will.[1] *

[*568] * SECTION VIII.

OF CONTRIBUTION TO REDEEM.

1, 2. General doctrine of contribution between parties.
3–8. Contribution, how affected by changes in the estate.
6 *a*. Of liability of purchaser of an equity for the mortgage-debt.
6 *b*. Same subject.
9. Contribution by dowress to redeem mortgage.
10. Rule of apportioning contribution.
11, 12. Of subrogation to rights of mortgagee.
13. Order in equity of applying mortgages.

1. It is a well-settled rule in equity, that, where land is charged with a burden, each portion of the estate should bear its equal share of such a charge; and if the owner of one part, in order to protect his share, is obliged to pay a common charge upon his own and another's share of the estate, he may call upon the other owner to contribute *pro rata* towards the amount thus paid.[2] But this doctrine obviously can apply only when the equities of the parties in interest are equal, and may be controlled by agreement, provided all these parties assent. Thus, suppose a creditor holds a mortgage upon

* Note. — In England, by statute 17 & 18 Vict. c. 118, heirs or devisees who now take mortgaged estates by descent or devise cannot call on the personal estate or other real estate to satisfy the mortgage-debt. Each part of the land charged by mortgage bears its due proportion of the charge, unless the will by which the devisee takes directs otherwise. Wms. Real Prop. 362.

[1] 2 Crabb, Real Prop. 914, 915, n; Cumberland *v.* Codrington, 3 Johns. Ch. 229, 257.

[2] Stevens *v.* Cooper, 1 Johns. Ch. 425; Story, Eq. Jur. § 477; Cheesebrough *v.* Millard, 1 Johns. Ch. 409; Lawrence *v.* Cornell, 4 Johns. Ch. 542; Gibson *v.* Crehore, 5 Pick. 146; Chase *v.* Woodbury, 6 Cush. 143; Salem *v.* Edgerly, 33 N. H. 46. Thus, where two tenants in common made a joint mortgage of their common estate, and then made partition, and the share set off to one was sold at a sheriff's sale, the purchaser, having been obliged to pay the whole mortgage-debt, had contribution against the mortgagor, who owned the other half of the estate. Stroud *v.* Casey, 27 Penn. St. 471; Briscoe *v.* Power, 47 Ill. 449.

two different estates, either of them amply sufficient to secure one debt. There would be no difficulty in so arranging between the mortgagor and mortgagee that the latter should release and give up his lien upon one of these estates, and rely wholly upon the other as security for his entire debt. And any one who should come into the place of either would take such rights as his grantor had in respect to these estates.[1] Thus, where two lots included in the same mortgage were sold, one to A and the other to B, and in receiving pay for them the vendor deducted from B's purchase-money the full amount due upon the mortgage, and B paid the mortgage-debt, it was held that he had no claim on A for contribution.[2]

2. But suppose, before this change had been made, a third person, as a creditor, or purchaser, or mortgagee, had acquired a lien upon the parcel thus left charged, no arrangement between the original mortgagor and mortgagee could change this party's * rights, or shift the proportion of [*569] the original debt with which the parcel should be charged.[3]

3. This subject has been previously touched upon, and is again resumed in order to consider how subsequent purchasers, assignees, and incumbrancers may be affected in respect to a common charge upon an estate by changes in the ownership of its several parts. The case of Stevens *v.* Cooper may serve to illustrate this question. In that case, one R. had mortgaged six parcels to Cooper to secure a single debt, Cooper at the time agreeing with him to release any of these lots to any purchaser to whom R. might sell if he, Cooper, should be paid a certain sum per acre. R. sold lot No. 82 to Stevens, who agreed with Cooper by parol to pay him so much per acre if he would release the lot. The widow and heirs of Stevens paid Cooper a part of this amount in 1801, and he gave them a receipt as for so much paid towards the mortgage, to be applied to the discharge of lot No. 82. After the sale to Stevens, R. sold four other lots, and the pur-

[1] Cheesebrough *v.* Millard, 1 Johns. Ch. 425; Johnson *v.* Rice, 8 Me. 157, 161.

[2] Pool *v.* Marshall, 48 Ill. 440.

[3] Powell, Mortg. 346, n.; Parkman *v.* Welch, 19 Pick. 331.

chasers received from Cooper releases of the same, in which he reserved the mortgage to be in full force on lot 82 and the other of the six lots. This was in 1797. But the Chancellor held, that by discharging the four lots he deprived the owners of the other two of the right to call upon their owners if they paid the whole mortgage, and that the holder of the mortgage could only hold lot No. 82 till he had received for the redemption thereof a sum bearing the same proportion to the whole mortgage-debt as the value of that lot, at the time of the making of the mortgage, bore to the value of the whole six.[1] A similar doctrine was held in Parkman *v.* Welch, where two parcels of land were mortgaged for a single debt, and one of these parcels the mortgagor conveyed to A, and another to B. The mortgagee gave A a release; and when he sought to hold B's parcel for the entire debt, it was held that he could charge it only *pro rata*.[2]

4. But if, when mortgagor has mortgaged two par-
[*570] cels to *secure one debt, he sells one of these, and either he or his heirs then pay the mortgage-debt, he or they cannot call upon the grantee of the other parcel for contribution.[3]

5. Whether, therefore, the holder of one of several mortgaged parcels shall be liable to contribute to a holder of another, depends upon the equities under which they severally hold their respective parcels. If their equities are equal, each is liable to contribute to the other who has paid the debt. A mortgagor himself could not call upon his grantee, because originally he was himself liable for the whole debt;[4] nor could an heir of the mortgagor, "for he sits in the seat of his ancestor."[5] Nor could a purchaser of an equity of redemption call

[1] Stevens *v.* Cooper, 1 Johns. Ch. 425.

[2] Parkman *v.* Welch, 19 Pick. 231; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Paxton *v.* Harrier, 11 Penn. St. 312; Johnson *v.* Rice, 8 Me. 157.

[3] Allen *v.* Clark, 17 Pick. 47; Chase *v.* Woodbury, 6 Cush. 143; Bradley *v.* George, 2 Allen, 392; Johnson *v.* Williams, 4 Minn. 268; Lock *v.* Fulford, 52 Ill. 166, 169.

[4] Chase *v.* Woodbury, 6 Cush. 143; Story, Eq. Jur. § 1233 a; Fleetwood's & Aston's case, Hob. 45.

[5] Harbert's case, 3 Rep. 11; Harvey *v.* Woodhouse, Select Cas. in Ch. 3, 4; Aldrich *v.* Cooper, 2 White & Tud. Lead. Cas. Pt. 1, 49; Clowes *v.* Dickenson, 5 Johns. Ch. 235; Beard *v.* Fitzgerald, 108 Mass. 134.

upon a prior purchaser, with warranty, of a parcel of the premises from the same grantor.[1] Nor can any subsequent purchaser call upon a prior one, where the several purchasers can be regarded as standing in the place of the mortgagor with his rights at the time of the date of his purchase.[2] The rule generally applied in equity in the case last supposed is, that parts of a mortgaged estate which have been conveyed in succession are liable for the debt in an inverse order of their alienation, the last conveyed being the first to pay.[3] In Iowa, successive purchasers of parcels of land covered by the same mortgage are held bound to contribute *pro rata* towards reducing the same, irrespective of the order of the purchasers;[4] whereas in Illinois, if several parcels are thus conveyed, the mortgagee must exhaust the last-conveyed parcel before he can resort to a prior one upon which to enforce his mortgage.[5] In Massachusetts, if conveyed simultaneously, they are to contribute their due proportion.[6] So it would be if the deeds conveying the equity subjected the several parcels to the incumbrance of the mortgage.[7] If several lots covered by the same mortgage are conveyed to different purchasers, and the mortgagee releases one of these, he will thereby discharge all the other parcels, *pro rata*, to the extent to which such parcel

[1] Gill *v.* Lyon, 1 Johns. Ch. 447, where one Wells mortgaged his estate, then sold a parcel with warranty; after which his estate in the residue was sold on execution to the plaintiff Gill, who paid the mortgage and claimed contribution of Lyon, which was disallowed by the court. Clowes *v.* Dickenson, 5 Johns. Ch. 235; Porter *v.* Seabor, 2 Root, 146; Aiken *v.* Gale, 37 N. H. 511.

[2] Chase *v.* Woodbury, 6 Cush. 143; Holden *v.* Pike, 24 Me. 427; Randell *v.* Mallett, 14 Me. 51; Cushing *v.* Ayer, 25 Me. 383; Lock *v.* Fulford, 52 Ill. 166, 169; Tomkins *v.* Wilterburgher, 56 Ill. 385, 391.

[3] Story, Eq. Jur. § 1233 a; Stoney *v.* Shultz, 1 Hill, Ch. 500; Jenkins *v.* Freyer, 4 Paige, Ch. 47; Guion *v.* Knapp, 6 Paige, Ch. 35; Hartley *v.* O'Flaherty, Lloyd & G. Cas temp. Plunket, 216; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565; Donley *v.* Hays, 17 S. & R. 400; P. & M. Bank *v.* Dundas, 10 Ala. 661; Cumming *v.* Cumming, 3 Ga. 460; Ferguson *v.* Kimball, 3 Barb. Ch. 616; Kellogg *v.* Rand, 11 Paige, Ch. 59; Skeel *v.* Spraker, 8 Paige, Ch. 182; Black *v.* Morse, 3 Halst. Ch. 509; Henkle *v.* Allstadt, 4 Gratt. 284; Schryver *v.* Teller, 9 Paige, Ch. 173; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Jones *v.* Myrick, 8 Gratt. 179; Gates *v.* Adams, 24 Vt. 70; Adams, Eq. Jur. 3d Am. ed. p. 270, n. E.; Inglehart *v.* Crane, 42 Ill. 261; McKinney *v.* Miller, 19 Mich. 156.

[4] Barney *v.* Myers, 28 Iowa, 478.

[5] Tomkins *v.* Wilterburger, 56 Ill. 385.

[6] Chase *v.* Woodbury, 6 Cush. 143.

[7] Briscoe *v.* Power, 47 Ill. 448.

was originally chargeable, provided the equities of each are equal.[1] And if these parcels have been conveyed consecutively, and the mortgagee have actual notice of such sales, and releases one of the later parcels, he releases, *pro tanto*, his claim upon the prior ones. The record of these conveyances would not be constructive notice thereof to the mortgagee; although each successive purchaser is bound to know the mortgage that rests upon his parcel, and what has become of the several parcels embraced in this mortgage.[2]

5 *a*. It cannot, however, be said that the doctrine above stated, that, where several persons have successively purchased parcels of a mortgaged estate, their liability to contribute towards the payment of the mortgage-debt is in the inverse order of their purchases, is settled, since authorities of high respectability are opposed to each other upon the subject. The question relates, in the first place, to cases where the several purchasers have duly recorded their deeds. In the next place, each purchaser is to be understood as having paid for an unincumbered title, without any agreement to contribute towards satisfying the mortgage, each receiving from the mortgagor a deed with covenants of title. All the cases, moreover, agree, that so far as the mortgagor himself is concerned, the debt being a personal duty, if he pays it he has no right to call upon the purchaser of a part of the mortgaged premises, while he himself retains a part, to contribute towards such debt.[3] The cases further agree, that, if the equities between two or more persons in respect to an incumbrance upon their estates are equal, each must share his own proportion in relieving these estates.[4] The question, therefore, between the two classes of decisions above referred to has been, whether the equities of successive purchasers of parts of a mortgaged estate in respect to the incumbrance are equal, or one is prior or superior to the other. The ground upon which the latter doctrine rests seems to be this. When

[1] Taylor *v.* Short, 27 Iowa, 361.

[2] Inglehart *v.* Crane, 42 Ill. 261–269; Briscoe *v.* Power, 47 Ill. 448.

[3] Chase *v.* Woodbury, 6 Cush. 147; Allen *v.* Clark, 17 Pick. 55.

[4] Salem *v.* Edgerly, 33 N. H. 50; Allen *v.* Clark, 17 Pick. 47; Stevens *v.* Cooper, 1 Johns. Ch. 425; Aiken *v.* Gale, 37 N. H. 501; Gibson *v.* Crehore, 5 Pick. 152.

the mortgagor parted with one parcel of his estate, reserving the remainder, he, as to his grantee, charged the entire debt upon that part which he retained. And when he sold that, or any part of it, the purchaser had in respect to it no better rights than himself, and consequently took it subject to the debt, without any right to call on the prior purchaser for contribution. The idea that the equities in such a case are equal seems to rest on this consideration. When the successive purchasers took deeds of their lands, they all knew them to be under a mortgage ; they all expected the mortgagor, he being the debtor, would pay the debt, and took from him covenants to that effect, each paying the full value of the estate as if unincumbered ; each, therefore, relied upon the mortgagor to pay the debt ; and so far as they, by their lands, were sureties for such a payment, they stood towards the mortgagor in the light of sureties, having the rights of sureties between each other, by which, by a familiar rule of equity, if any one of them paid the debt, he became entitled to hold the whole property mortgaged until the owners of the other parts than his own contributed their respective shares of the redemption-money.[1] The point of difference, therefore, between those who maintain these doctrines, seems to be, whether the equities of the parties shall be determined by an arbitrary rule of law, or by what the parties understood and expected when they became the purchasers. Judge Story favored the latter of these doctrines. The able and learned annotator and editor of his later edition, Mr. Redfield, strongly inclines to sustain the former doctrine.[2] Among the courts of the several States that sustain the prior equity of the earliest purchaser are those of Alabama, Georgia, Illinois, Indiana, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina, Virginia, Wisconsin ; and to these Massachusetts, and probably Maine, may now be added ; while a case from the Irish courts goes to sustain the same point.[3] On the other hand, the courts of the

[1] *Post*, p. *574.

[2] Story, Eq. § 1233 b, and note.

[3] Cowden's estate, 1 Penn. St. 267, 277, where the court deny that the authorities cited by Story, J., with one exception, sustain his doctrine ; Patty *v.* Pease, 8 Paige, Ch. 277, in which it is said to be a mere rule in equity ; Nailer *v.* Stan-

following States either assume the equities between the purchasers in such a case to be equal, or sustain the doctrine by elaborate opinions; viz., Ohio, Kentucky, Tennessee, Iowa, and North Carolina. And so does one of the English Chancery cases.[1] The rule in Massachusetts seems to have been going through a change since the decision of Parkman *v.* Welch, and to conform at length to the liability of purchasers for the redemption of existing mortgages, in the inverse order of their respective purchases, where the parcels of the estate are conveyed by deeds of warranty. An instance of a second purchaser of a part of a mortgaged estate, so purchasing as to have no claim for contribution upon a prior purchaser of another part, is found in Bradley *v.* George, where A., having mortgaged a parcel of fifteen acres, conveyed six of these to J. S. with warranty. He then became insolvent, and his equity of redemption was sold to J. N. J. N. then mortgaged the other nine acres to W., who obtained an assignment of the first mortgage; and the question was, whether he had any claim on J. S. for contribution, or for the redemption of his six acres from this mortgage. It appeared that the nine acres were of greater value than the amount of the mortgage. The

ley, 10 S. & R. 450; Day *v.* Patterson, 18 Ind. 114, where it is stated as *probably* the rule of law; Shannon *v.* Marselis, Saxton, Ch. 413, 421; Gaskill *v.* Sine, 13 N. J. 400; Johnson *v.* Williams, 4 Minn. 268; Lyman *v.* Lyman, 32 Vt. 79. See Gates *v.* Adams, 24 Vt. 70; Brown *v.* Simons, 44 N. H. 475, and Mr. Redfield's note, p. 167; Huntly *v.* O'Flaherty, Lloyd & G. Cas. temp. Plunket, 216; Holden *v.* Pike, 24 Me. 427; Cushing *v.* Ayer, 25 Me. 383; Sheperd *v.* Adams, 32 Me. 64. See also Salem *v.* Edgerly, 33 N. H. 46; Aiken *v.* Gale, 37 N. H. 501. Also Presbyterian Corporation *v.* Wallace, 3 Rawle, 165, the doctrine of which is impugned by Cowden's Estate, *sup.*; P. & M. Bank *v.* Dundas, 10 Ala. 661; Mobile Dock & Ins. Co. *v.* Kuder, 35 Ala. 717, 721; Cumming *v.* Cumming, 3 Kelly, 460; Aiken *v.* Bruen, 21 Ind. 139; Mason *v.* Payne, Walker, Ch. 459; Ireland *v.* Woolman, 15 Mich. 256; Brown *v.* Simons, 45 N. H. 211; Jumel *v.* Jumel, 7 Paige, 591; Lafarge Ins. Co. *v.* Bell, 22 Barb. 54; Stoney *v.* Shultz, 1 Hill, Ch. (S. C.) 500; Conrad *v.* Harrison, 3 Leigh, 532; Spence *v.* Aldrich, 15 Wis. 316; State *v.* Titus, 17 Wis. 241; Beevor *v.* Luck, L. R. 4 Eq. Cas. 546; Inglehart *v.* Crane, 42 Ill. 261.

[1] Parkman *v.* Welch, 19 Pick. 231. See Brown *v.* Worcester Bank, 8 Met. 47; Green *v.* Ramage, 18 Ohio, 428; Dickey *v.* Thompson, 8 B. Mon. 312. See Morrison *v.* Beckwith, 4 Mon. 73; Jobe *v.* O'Brien, 2 Humph. 34; Bates *v.* Ruddick, 2 Iowa, 423, a full and well-considered case; Barnes *v.* Racster, 1 Younge & C. Ch. 401; Stanley *v.* Stocks, 1 Dev. Eq. 314, 317. See also Adams Eq. Am. ed. 270, note of American cases. Barney *v.* Myers, 28 Iowa, 478.

court held that W. had no better rights than J. N., nor he any better rights than A.; and as A. could not have called on J. S. for contribution, the latter was exempt from such liability. But it will be perceived that J. N. purchased only an equity of redemption, with a full knowledge that the debtor A. was insolvent, and could not, therefore, have relied upon any expectation that he would pay the mortgage-debt. He got, therefore, all he had a right to expect; viz., the right to pay this debt, and thereby redeem the estate in the place or stead of J. N.[1] In another case, the court say: "It must be considered as settled, that, when the owner of an equity of redemption conveys by deed of warranty a part of the mortgaged premises, neither he nor his heirs, nor subsequent grantees, with notice of the remaining part of the mortgaged premises, are entitled to contribution from the first grantee towards payment of the mortgage-debt." But this doctrine only applies to purchasers in succession from the mortgagor, and not to titles acquired from the grantee of a mortgagor who had purchased his entire interest or equity.[2] And the rule which equity applies in these cases may be controlled by the agreement of the parties.[3]

*6. But a prior purchaser of part of the mortgaged [*571] premises may make himself liable to contribute to a subsequent one who shall have paid an outstanding mortgage, by his manner of dealing with the vendor under whom they both claim. Thus, where a mortgagor of two parcels, to secure one debt, sold one to A. B., taking back a mortgage to secure the purchase-money, and then sold the other parcel to C. D., and became insolvent, and C. D. had to pay the entire debt, it was held that he thereby became entitled to have the

[1] Bradley *v.* George, 2 Allen, 392; George *v.* Wood, 9 Allen, 82; Pike *v.* Goodnow, 12 Allen, 474; Welsh *v.* Beers, 8 Allen, 151; Kilborn *v.* Robbins, 8 Allen, 470; George *v.* Kent, 7 Allen, 17; George *v.* Wood, 11 Allen, 41. See Chase *v.* Woodbury, 6 Cush. 148. See an able examination of the question of the rights of several purchasers of parts of a mortgaged estate in respect to each other, with a reference also to the civil law, Dixon on subrogation, &c., p. 30, *et seq.*; Locke *v.* Fulford, 52 Ill. 166.

[2] Norris *v.* Morrison, 45 N. H. 500.

[3] State *v.* Throup, 15 Wis. 314; Welsh *v.* Beers, 8 Allen, 151; Bryant *v.* Damon, 6 Gray, 564.

mortgage given by A. B. to his grantor assigned to him, and by means thereof to compel A. B. to contribute towards the redemption of the original mortgage.[1] And where one of two grantees of separate mortgaged parcels gave an agreement to his grantor that he would pay his proportion of the mortgage-debt, and the other grantee was obliged to pay the entire debt, it was held he might call upon the first for contribution.[2]

6 *a*. Although the subject has already been somewhat treated of,[3] its importance, in its practical bearing, justifies a further consideration of how far, and in what cases, a purchaser or second mortgagee of an estate already mortgaged may become personally liable for the payment of the debt thereby secured. Sometimes the deed of such purchaser or mortgagee excepts the former mortgage from its covenants; sometimes the deed recites that the debt is to be paid as a part of the purchase-money, or assumes in some form that the purchaser or mortgagee of the estate is to pay the first mortgage-debt. The question in such cases is, whether the purchaser takes his estate charged with the payment of the debt, and which he must pay to save his estate, or whether he becomes personally responsible, by reason of having received from the debtor assets, out of which he directly or by implication agrees to pay the debt.[4] In one case, the mortgagor conveyed the estate to the defendant, "subject to two mortgages held," &c., "which mortgages are deemed and taken as a part of the consideration of this deed, and which the party of the second part (the purchaser) hereby assumes to pay." The holder of the mortgage-debt sued the defendant upon this undertaking, and recovered, on the ground that he made a promise to the grantor for the benefit of the plaintiff, who might, therefore, enforce it by suit in his own name.[5] A similar doctrine was held in another case, where the purchaser's

[1] Allen *v.* Clark, 17 Pick. 47.

[2] Sawyer *v.* Lyon, 10 Johns. 32; Briscoe *v.* Power, 47 Ill. 447, 6 Gray, 564.

[3] *Ante*, p. *518.

[4] Ferris *v.* Crawford, 2 Denio, 595; Thompson *v.* Thompson, 4 Ohio St. 349; Halsey *v.* Reed, 9 Paige, 446; Belmont *v.* Coman, 22 N. Y. 438; Braman *v.* Dowse, 12 Cush. 229.

[5] Burr *v.* Beers, 24 N. Y. 178; Thompson *v.* Thompson, 4 Ohio St. 353.

deed recited "the payment of which said mortgage, with the interest now accrued, and hereafter to accrue, is hereby assumed by the party of the second part."[1] But an heir, devisee, or purchaser, by simply taking land charged with a mortgage-debt, does not make the debt his own, or subject himself or his personalty in equity to its payment. But when a purchaser assumes the debt as a part of the price he is to pay for the purchase, he makes it his own, and subjects his personalty to relieve the realty. So, where the purchaser assumes to pay the debt as a part of the consideration for the purchase, he makes the debt his own, both as it regards the mortgagor and mortgagee, and an action will lie in favor of the mortgagee against the purchaser for the amount of the incumbrance retained out of the price he agreed to pay.[2] The clew which is to guide in such cases seems to be, whether the deed recites that the grantee assumes to pay the mortgage-debt, or is to pay it, or words to that effect. If it does, though it be a deed-poll, it binds the grantee by such recital, and he becomes personally liable therefor. Otherwise it is regarded as a descriptive clause, or one inserted for the protection of the grantor from liability upon his covenants of title.[3]

6 *b*. That a parol contract made by A to B to pay C money, if sustained by a sufficient consideration, may be enforced by suit in C's name, seems to be conceded as law both in New York and Massachusetts.[4] But where the contract is under seal, the law of the latter State does not consider there is a sufficient privity between A and C to sustain an action thereon in C's name. And in applying this doctrine to the case of a sale of mortgaged premises, where the deed to the purchaser recited that the premises were subject to a mortgage for a certain sum, "which mortgage with the note for which it was given the purchaser is to assume and cancel," it was held that no action lay in favor of the mortgagee against

[1] Thorp *v.* Keokuk Coal Co., 47 Barb. 440, s. c. 48 N. Y. 253–260.

[2] Lennig's Estate, 52 Penn. 138, 139; Hoff's Appeal, 24 Penn. 200.

[3] Braman *v.* Dowse, 12 Cush. 227; Drury *v.* Tremont, &c. Co., 13 Allen, 171; Belmont *v.* Coman, 22 N. Y. 438, *vid. post*, p. *672; *ante*, p. *518.

[4] Braman *v.* Dowse, 12 Cush. 228; Millard *v.* Baldwin, 3 Gray, 486; Dow *v.* Clark, 7 Gray, 201; Lawrence *v.* Fox, 20 N. Y. 268.

the purchaser.[1] But in New York, while the courts hold that if a second mortgagee covenant with the mortgagor that he will assume and pay the prior mortgage, no action would lie in favor of the mortgagee to enforce the contract in his own name, it would be otherwise if the conveyance was an absolute one, and the assumption of the mortgage-debt was a part of the consideration for the conveyance. It is considered as so much money left in the hands of the purchaser for the use of the mortgagee.[2] And the mortgagee may recover of the purchaser, if he expressly agrees with the vendor to pay the mortgage-debt.[3] As a rule in equity, the court of New Jersey hold a purchaser of a mortgaged estate, who assumes in his deed to pay off the mortgage-debt, liable thereon to the mortgagee, although the estate may not prove sufficient to satisfy the debt;[4] but a different rule prevails in Missouri.[5]

7. But where a purchaser, from a mortgagor of the mortgaged estate, agrees with his grantor to assume and pay the mortgage-debt, the mortgagor still remains the principal debtor; the only remedy of the mortgagee against the purchaser being upon the estate, and not by any action upon his agreement with the mortgagor.[6] Though, as between [*572] the vendor and *purchaser, in such a case the purchaser becomes the principal and the vendor the surety in respect to the debt.[7]

8. A mortgagee may resort for his remedy, where there are two or more parcels included in his mortgage, and one or more of them has been sold and the others retained by

[1] Mellen *v.* Whipple, 1 Gray, 317.

[2] Garnsey *v.* Rogers, 47 N. Y. 233; Burr *v.* Beers, *sup.*; Ricard *v.* Saunderson, 41 N. Y. 179.

[3] Thorp *v.* Keokuk Coal Co., 48 N. Y. 256, 257.

[4] Klapworth *v.* Dressler, 2 Beasley, Ch. 62.

[5] Fithian *v.* Monks, 43 Mo. 520.

[6] Marsh *v.* Pike, 1 Sandf. Ch. 210, s. c. 10 Paige, Ch. 595; Morris *v.* Oakford, 9 Penn. St. 498; Carpenter *v.* Koons, 20 Penn. St. 222; Mellen *v.* Whipple, 1 Gray, 317. But see Klapworth *v.* Dressler, 13 N. J. 62, that mortgagee may proceed against such purchaser for the debt.

[7] Ferris *v.* Crawford, 2 Denio, 595; Blyer *v.* Monholland, 2 Sandf. Ch. 478; Tripp *v.* Vincent, 3 Barb. Ch. 613; Flagg *v.* Thurber, Id. 196; Morris *v.* Oakford, 9 Penn. St. 498; Russell *v.* Pistor, 3 Seld. 171; Lilly *v.* Palmer, 51 Ill. 333.

the mortgagor, to either of them, that in the hands of the vendee or that in the hands of the mortgagor, at his election.[1] But where the parts of the mortgaged estate are known to the mortgagee to have come to third persons, with the liens belonging thereto in favor of such of the owners as shall pay the mortgage-debt, as above explained, the holder of the mortgage has no right to release any of these parts to the prejudice of the holders of such liens.[2] And if he releases the part of the estate which is primarily liable for the debt, he thereby discharges the other portion[3] to the extent of the value of the part thus released.[4] In order, however, that a release shall have this effect, it must be made with notice on the part of the mortgagee, that the portion alleged to be constructively released had been previously sold by the mortgagor, so as to have made the parcel which he had actually released primarily liable for the debt.[5] And it has been held that the mere recording of a subsequent mortgage of one of several parcels is not constructive notice of such mortgage to a prior mortgagee of the entire estate.[6]

9. It is by the application of the principles above explained that the rights of a widow to dower in an equity of redemption are ascertained and enforced. She cannot insist that the holder of the mortgage shall relinquish his claim upon the estate in her favor, without being paid the amount of his mortgage in

[1] La Farge Ins. Co. *v.* Bell, 22 Barb. 54; Knowles *v.* Lawton, 18 Ga. 476.

[2] McLean *v.* Lafayette Bank, 3 McLean, 587; Deuster *v.* McCamus, 14 Wis. 311; Inglehart *v.* Crane, 42 Ill. 261.

[3] Paxton *v.* Harrier, 11 Penn. St. 312; Brown *v.* Simons, 44 N. H. 475.

[4] Parkman *v.* Welch, 19 Pick. 231; Guion *v.* Knapp, 6 Paige, Ch. 35; Cheesebrough *v.* Millard, 1 Johns. Ch. 409; Gaskill *v.* Sine, 13 N. J. 400; Johnson *v.* Williams, 4 Minn. 268; Johnson *v.* Rice, 8 Me. 157, 161; Blair *v.* Ward, 2 Stockt. Ch. 126; Salem *v.* Edgerly, 33 N. H. 50; Brown *v.* Simons, *sup.*; George *v.* Wood, 9 Allen, 83.

[5] Patty *v.* Pease, 8 Paige, Ch. 277; Guion *v.* Knapp, *sup.*; Cheesebrough *v.* Millard, 1 Johns. Ch. 401; Aiken *v.* Gale, 37 N. H. 501, 511; Straight *v.* Harris, 14 Wis. 513.

[6] Stuyvesant *v.* Hall, 2 Barb. Ch. 151; King *v.* McVickar, 3 Sandf. Ch. 192; Taylor *v.* Maris, 5 Rawle, 51; Cheesebrough *v.* Millard, *sup.* 414; Blair *v.* Ward, *sup.*; Deuster *v.* McCamus, 14 Wis. 312; Stuyvesant *v.* Hone, 1 Sandf. Ch. 426; Straight *v.* Harris, 14 Wis. 514; George *v.* Wood, 9 Allen, 83; Wheelwright *v.* Depeyster, 4 Edw. Ch. 232.

full; and if other parties interested in the equity of
[*573] * redemption neglect or refuse to redeem the mortgage, her only remedy is to redeem the entire estate, and hold the same as equitable assignee till the other parties are willing to contribute their proportion of the mortgage-debt.[1] Whereas, if any other party having the equity of redemption pay the mortgage, she would be obliged to contribute her proportion of the redemption-money before recovering her dower,[2] or, in Massachusetts, might have her dower according to the value of the estate, after deducting the amount paid for the redemption.[3] The general doctrine may be stated thus: If one who has a right to redeem a mortgage, and to require an assignment of it to him for his protection, pays it, and a full satisfaction is indorsed upon the mortgage, it may still, as between the parties interested in the estate, be held to be a subsisting security. The payment will be treated as a purchase in favor of the party making it.[4] Where one took a mortgage upon a part of an estate which had previously been mortgaged, and wished to save his estate from foreclosure under this prior mortgage, he had to pay the entire debt, and, by so doing, became subrogated to the place of the prior mortgagee for so much of the debt as the whole of the estate exceeded the debt for which he held his mortgage.[5] So where one owned two undivided eighth parts of an estate, subject to a mortgage, and his co-tenant of the six eighth parts held this mortgage, he was obliged, in order to redeem his two-eighths, to pay the entire mortgaged debt; but, by so doing, he became subrogated to six eighth parts of it, which

[1] McCabe *v.* Bellows, 7 Gray, 148; Gibson *v.* Crehore, 5 Pick. 146; Brown *v.* Lapham, 3 Cush. 551; Eaton *v.* Simonds, 14 Pick. 98; Bell *v.* Mayor, &c., 10 Paige, Ch. 49. And this is true of all tenants for life. Lamson *v.* Drake, 105 Mass. 567; Spencer *v.* Waterman, 36 Conn. 342.

[2] Messiter *v.* Wright, 16 Pick. 151; Gibson *v.* Crehore, 5 Pick. 146; Clough *v.* Elliott, 3 Fost. (N. H.) 182; Adams *v.* Hill, 9 Fost. (N. H.) 202.

[3] McCabe *v.* Bellows, 7 Gray, 148; Gen. Stat. 1860, c. 90, § 2. See Van Vronker *v.* Eastman, 7 Met. 157; Henry's case, 4 Cush. 257.

[4] Drew *v.* Rust, 36 N. H. 343; Robinson *v.* Leavitt, 7 N. H. 99; Rigney *v.* Lovejoy, 13 N. H. 252; Aiken *v.* Gale, 37 N. H. 505; Cheesebrough *v.* Millard, 1 Johns. Ch. 413.

[5] Knowles *v.* Rablin, 20 Iowa, 101, 104.

his co-tenant would have to repay him in order to redeem his share of the estate.[1]

10. It must have occurred to the reader that the interests acquired by actual or constructive assignments and conveyances of parcels of mortgaged premises may be very various, and often produce questions involving great difficulty in their determination; for instance, how much each part-owner shall be obliged to contribute to redeem his share of the estate. Thus a dowress can have but a life-estate in a portion of the premises, another may have a lease of the premises for years, while a third may have a reversion in fee or for life; and it may become necessary to determine what each of these parties shall contribute to save their interest from foreclosure. It is a matter, as has been stated, which does not affect or concern the mortgagee, as he may look to the estate irrespective of the owners. The rule as now settled seems to be as follows: A tenant for life is bound to keep down the current interest (and if tenant for years is liable at all, the same rule would seem to apply), but not to pay any part of the principal.[2] Now if, for example, there is a tenant for life, and a remainder-man in fee of an estate, subject to a mortgage which is due and must be paid at once to save foreclosure, and the remainder-man, to save the estate, pays the mortgage, he is not obliged to take the * share of the ten- [*574] ant for life in annual instalments of interest to continue as long as he shall live. He is entitled, as equitable assignee of the mortgagee, to immediate payment; and the sum which he thus has a right to claim is whatever the present worth of an annuity equal to the amount of the annual interest would be, computed for the number of years which the tenant will live. This is assumed by the courts to be fixed for this purpose by tables of longevity, which are recognized as reliable in their computation of the chances of life. Whatever this sum may amount to is deducted from the gross amount paid for redemption, and the balance is the proportion to be paid

[1] Merritt *v.* Hosmer, 11 Gray, 276.

[2] Tud. Cas. 59; Squire *v.* Compton, 2 Eq. Cas. Abr. 387; Swaine *v.* Perine, 5 Johns. Ch 482; Story, Eq. Jur. § 487; Powell, Mortg. 924, n.; Bell *v.* Mayor, &c., *sup.*

by the remainder-man. Of course the same rule of computation is applied if the tenant redeems, and calls on the remainder-man for contribution. A widow's share would be one-third as much as that of a tenant for life of the whole estate.[1] *

11. Under the broad power which equity exercises in treating parties who are interested to avail themselves of the benefit of a mortgage, as equitable assignees thereof, when by so doing it is made to fulfil the original purpose of being a security for the debt, a surety may be substituted in the place of the creditor to whom the principal debtor has made a mortgage as security for the payment of the debt, if such surety is compelled to pay it.[2] And he would have a right to insist upon the debt being paid out of the mortgaged estate, in preference to subsequent incumbrances created by the mortgagor. And if a wife, as surety for a husband, pay the debt, she will be subrogated to the place of her husband's mortgagee.[3] So if a surety pay his principal's debt to a creditor who holds a mortgage to secure the same, he will be subrogated to the place of the creditor, not only as against his principal, but his wife also, if she joined in the mortgage.[4] There is this distinction between subrogation to the place and rights of a mortgagee, and an assignment of these rights.

* NOTE. — In the case of Houghton *v.* Hapgood, 13 Pick. 158, the court ascertained the expectation of life by Dr. Wigglesworth's tables, and the value of the life-right by Dr. Bowditch's life-annuity tables.

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[1] Swaine *v.* Perine, 5 Johns. Ch. 490; Gibson *v.* Crehore, 5 Pick. 146; Houghton *v.* Hapgood, 13 Pick. 158; Squire *v.* Compton, 2 Eq. Cas. Abr. 387; Foster *v.* Hilliard, 1 Story, 77, 90; Carll *v.* Butman, 7 Me. 102, 105; Jones *v.* Sherrard, 2 Dev. & Bat. Eq. 179, 189.

[2] Cheesebrough *v.* Millard, 1 Johns. Ch. 409; Hayes *v.* Ward, 4 Johns. Ch. 123; Mathews *v.* Aikin, 1 Comst. 595; Root *v.* Bancroft, 10 Met. 48; Ottman *v.* Moak, 3 Sandf. Ch. 431; Burton *v.* Wheeler, 7 Ired. Eq. 217; Bank of South Carolina *v.* Campbell, 2 Rich. Eq. 179. Even though the debt be barred by statute. Ohio Life Ins. Co. *v.* Winn, 4 Md. Ch. Dec. 253; Stiewell *v.* Burdell, 18 La. An. 19; Billings *v.* Sprague, 49 Ill. 511.

[3] Neimcewicz *v.* Gahn, 3 Paige, 640; Bank of Albion *v.* Burns, 46 N. Y. 170, 178.

[4] Dearborn *v.* Taylor, 18 N. H. 153; McHenry *v.* Cooper, 27 Iowa, 146; Phares *v.* Barbour, 49 Ill. 375; Rogers *v.* Trustees, &c., 46 Ill. 428.

The one assumes the mortgage-debt to be paid; the other assumes that the debt is unpaid, and still in force. Thus where a junior mortgagee pays off a prior incumbrance in order to protect his interest, he comes into the place of the prior mortgagee by subrogation by the act of the law, without any act done by such mortgagee. If one be surety for a debt which is secured by a mortgage made by his principal to the creditor, and he have to pay the debt, he may by the law of New York insist upon the mortgagee assigning to him the mortgage, as well as the debt thereby secured. But unless he pays the debt as surety, or as standing in the place of a surety, he cannot insist upon an assignment being made to him of the debt and mortgage.[1] And because of this right in a surety to be subrogated to the place of the mortgagee, if he pays the debt, if the mortgagee discharge the mortgage without his consent, the surety is thereby himself discharged from liability for the debt.[2] And where a principal, to secure his surety, made an absolute deed of land, and the grantee died before paying the debt, it was held that the creditor had thereby an equitable lien on the estate for the amount of his debt.[3] So a creditor may avail himself, as a security for his debt, of the benefit of a mortgage which his debtor has made to a surety for such debt by the way of indemnity.[4] Thus, where A gave to B, who was an accommodation indorser, a mortgage of indemnity, and both maker and indorser became insolvent, it was held, that the holders of the notes might avail themselves of the mortgage security.[5] But where a debtor mortgaged to his creditor land which was subject to a

[1] Ellsworth *v.* Lockwood, 42 N. Y. 96, 100.

[2] Port *v.* Robbins, 35 Iowa, 208, 213.

[3] Roberts *v.* Richards, 36 Ill. 339.

[4] Curtis *v.* Tyler, 9 Paige, Ch. 432; Ten Eyck *v.* Holmes, 3 Sandf. Ch. 428; Moore *v.* Moberly, 7 B. Mon. 299; Eastman *v.* Foster, 8 Met. 19; Stewart *v.* Preston, 1 Fla. 10; Besley *v.* Lawrence, 11 Paige, Ch. 581; Arnold *v.* Foot, 7 B. Mon. 66; Story, Eq. § 638; New Bedford Inst. for Savings *v.* Fairhaven Bank, 9 Allen, 175; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; Phillips *v.* Thompson, 2 Johns. Ch. 418; Aldrich *v.* Martin, 4 R. I. 520, case of an indorser; 1 Cases in Eq. Abr. 93; Klapworth *v.* Dressler, 2 Beasley, Ch. 64; Blyer *v.* Monholland, 2 Sandf. Ch. 478.

[5] Rice *v.* Dewey, 13 Gray, 47. See Hall *v.* Cushman, 16 N. H. 462, as to one surety availing himself of a mortgage made by the principal to his co-surety.

homestead right, and could not be reached by general creditors, and became bankrupt, and his creditor released his mortgage and came in for a dividend out of the debtor's other estate, and the other creditors objected that he had released what ought to have gone to relieve the estate out of which they were to be paid, it was held that his lien was a personal one only, since the mortgaged estate was not liable for the debts of the debtor, and therefore there was no wrong [*575] done to them by such release.[1] * If two co-debtors mortgage land belonging to them jointly to secure a joint debt, and one of them is obliged to pay the whole debt, he becomes in technical language subrogated to the place of the mortgagee, as to the mortgage upon his co-debtor's half of the estate, as security for his contributing his share of the debt,[2] unless, as between the debtors, one is a principal and the other a surety in the mortgage-debt. If, in such a case, the real principal of the debt pay it, the doctrine of subrogation as to the land of the other mortgagor does not apply.[3] Thus, where one made two successive mortgages of the same estate to two different mortgagees, and the second of these was foreclosed, and the interest in both then came into the same owner's hands, it was held that the mortgagor could not after this redeem the first mortgage so as to acquire a right to open the foreclosure of the second, and then redeem from it. If he paid the first mortgage, he extinguished it, and could not thereby claim to be subrogated to the place of the mortgagee.[4] And this right of subrogation, in the cases above supposed, though originally a doctrine of equity, has become recognized as a legal right.[5]

11 *a*. A mortgagor will be subrogated to the place and the rights of the mortgagee in respect to the mortgage-debt, when it is necessary in order to accomplish the purposes of justice, even against the person claiming under the mortgagor him-

[1] Dickson *v.* Chorn, 6 Iowa, 19. [2] Sargent *v.* M'Farland, 8 Pick. 502.

[3] Crafts *v.* Crafts, 13 Gray, 362; Cherry *v.* Monro, 2 Barb. Ch. 618; Kilborn *v.* Robbins, 8 Allen, 471.

[4] Butler *v.* Seward, 10 Allen, 466.

[5] La Farge *v.* Herter, 11 Barb. 159. See Dixon on Subrogation, 13 *et seq.*, and citations from the Civil Law; Aiken *v.* Gale, 37 N. H. 501; Cornell *v.* Prescott, 2 Barb. 16; Fletcher *v.* Chase, 16 N. H. 42.

self. Thus, if a mortgagor sells the mortgaged estate subject to the payment of the mortgage, and the holder of the debt thereby secured calls upon the mortgagor to pay the same, and he thereupon pays it, he will, by so doing, become at once subrogated to the place of the mortgagee, with a right to reimburse himself out of the mortgaged premises. And this would be equally so though the premises were held by a purchaser from the vendee of the mortgagor. In equity, the mortgaged estate in such case becomes the primary fund out of which the debt is to be paid.[1] This principle is carried out in respect to the assignees of the respective parties. As where A, having mortgaged an estate to B, sold it to C, who agreed, as recited in his deed, to pay B's mortgage. C also gave back a mortgage to A, containing an exception from the covenants of this mortgage to B, to secure the purchase-money. This mortgage contained covenants for title. A then assigned this latter deed to N, subject to the condition therein, and indorsed the mortgage-note without recourse. N having died, B assigned his mortgage to the executors of N, who sued A on his note secured thereby. It was held that if A paid this debt he would be subrogated to the place of B as against C, and also as against the holder of the second mortgage, because the holder took it subject to the condition to pay B's mortgage which was contained in C's deed. The executors, therefore, as holders of B's mortgage, could not recover in an action against A, because, as his assignees, they were ultimately bound to pay the debt which they were suing.[2]

12. This doctrine of equity rests upon the principle that the mortgage being upon the debtor's property, and intended as security for the payment of the debt, shall be so held by

[1] Jumel *v.* Jumel, 7 Paige, Ch. 591; Cox *v.* Wheeler, 7 Paige, Ch. 257, 258; Baldwin *v.* Thompson, 6 La. 474, where the doctrine is extended to all cases where one pays the debt of another which he is legally bound or has an interest to pay; he is subrogated to the rights of the creditor against the person for whom he has paid; Dixon on Subrogation, 86–93; Fletcher *v.* Chase, 16 N. H. 42; Robinson *v.* Leavitt, 7 N. H. 100; Baker *v.* Terrell, 8 Minn. 199; Kinnear *v.* Lowell, 34 Me. 299; Halsey *v.* Reed, 9 Paige, 446; Funk *v.* McReynold, 33 Ill. 481, 495.

[2] Sweet *v.* Sherman, 109 Mass. 231.

any one having a right to recover the debt from the principal debtor. It has been accordingly held, that a surety may have the benefit of the mortgage made to the creditor by the principal debtor, even though, before he has been called on to pay the debt, the mortgagor has sold and conveyed the estate to another.[1] And where the creditor voluntarily does an act invalidating or discharging the security that he holds from the principal for a debt to which there is a surety, he will thereby lose his claim on the surety to the same extent as the latter is injured by such act of the creditor.[2] So if the creditor gives time to the principal, to the injury of the surety, it not only discharges the surety, but avoids any mortgage which the debtor may have made to the surety to indemnify him; and this would extend to the case of a wife who is such surety.[3] Thus where husband and wife made a bond and mortgage of her estate, payable at a certain time, intended as collateral security for certain notes due from him, and the mortgagee renewed these notes after the time when the bond had become due by its terms, it was held to discharge the mortgage as to the wife and her heirs.[4] But to have that effect, the creditor must have known that the one to whom he gave time was a principal for whom the other was a surety.[5] And the same rule applies where there are two sureties, and one of them holds a mortgage to secure his indemnity, and his co-surety has to pay the debt; the latter is subrogated in the place of the former as to the security.[6] But a surety is not entitled to be thus substituted until the whole debt shall have been paid.[7] And he may lose the benefit of the subrogation by his own laches in suffering other persons to acquire a valuable interest in the land in consequence of his omitting to make known his own claim upon it.[8]

13. There is another principle which equity applies in the

[1] Gossin *v.* Brown, 11 Penn. St. 527.
[2] Hayes *v.* Ward, 4 Johns. Ch. 123; Cheesebrough *v.* Millard, 1 Johns. Ch. 409.
[3] Neimcewicz *v.* Gahn, 3 Paige, 642; Harberton *v.* Bennett, Batty, Ch. 389.
[4] Bank of Albion *v.* Burns, 46 N. Y. 170, 178. [5] Ib.
[6] Cheesebrough *v.* Millard, 1 Johns. Ch. 409.
[7] Stamford Bank *v.* Benedict, 15 Conn. 437.
[8] Jarvis *v.* Whitman, 12 B. Mon. 97.

case of two or more parties interested in the same mortgaged * property, which is somewhat more arbi- [*576] trary in its character than any yet spoken of. Thus it seems to be a well-settled rule in equity, that if a creditor holds two mortgages upon two different estates to secure one debt, and a creditor of the same debtor has a later mortgage to secure his debt upon one only of the parcels, equity will require of the first mortgagee that he shall exhaust the security he has in the parcel not covered by the second mortgage before he shall come upon the latter parcel.[1] So if a mortgagee hold collateral security also by means of a mortgage by a surety, equity would require him to exhaust his mortgage security from the principal before calling upon the estate of the surety.[2] The same rule would be applied if one mortgage covered two parcels, and a second mortgage were made to a third person upon one of them. "Accordingly, if A has a mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has a right to throw A, in the first instance, for satisfaction upon the security which he, B, cannot touch; at least, when it will not prejudice A's rights, or improperly control his remedies."[3] * But this does not extend to the

* NOTE. — The authorities, it is believed, have all limited the application of this doctrine to cases, where, by compelling the first mortgagee to exhaust one of the mortgage-funds before applying the other, the right of such mortgagee to a full satisfaction of his debt is not thereby materially affected; equity merely prescribing which fund shall be first applied and exhausted, before the second shall be made use of. McGinnis' Appeal, 16 Penn. St. 447; Gates *v.* Adams, 24

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[1] Powell, Mortg. 343, n.; Evertson *v.* Booth, 19 Johns. 486; Hannah *v.* Carrington, 18 Ark. 85; Lanoy *v.* Athol, 2 Atk. 446; Mechanics' Bank *v.* Edwards, 1 Barb. 271; Miami Ex. Co. *v.* United States Bank, Wright, Ohio, 249; McLean *v.* Lafayette Bank, 3 McLean, 387; Baine *v.* Williams, 10 S. & M. 113; Swigert *v.* Bank of Kentucky, 17 B. Mon. 285; Hartley *v.* O'Flaherty, Lloyd & G. Cas. temp. Plunket, 208; White *v.* Polleys, 20 Wis. 505; Dickson *v.* Chorn, 6 Iowa, 32; Clarke *v.* Bancroft, 13 Iowa, 327; Story, Eq. § 559; Inglehart *v.* Crane, 42 Ill. 261-269.

[2] Neimcewicz *v.* Gahn, 3 Paige, 642.

[3] Cowden's Estate, 1 Penn. St. 274; Cheesebrough *v.* Millard, 1 Johns. Ch. 412, 413; Story, Eq. § 633; Adams, Eq. Am. ed. 272, and note for American cases; 2 Lead. Cas. in Eq. 230, Am. ed.; Fisher, Mortg. 395, 396; Reilly *v.* Mayor, 1 Beasley (N. J.), 55, 57; Warren *v.* Warren, 30 Vt. 530, 535; Blair *v.* Ward, 2 Stockt. Ch. 120.

case of general creditors.[1] And if the first mortgagee insist upon availing himself, in the first place, of the parcel mortgaged to the second mortgagee, equity will compel him to assign the lien he has upon the first parcel to the second mortgagee for his benefit.[2] This rule, that a senior mortgagee shall exhaust so much of the mortgaged property as does not secure a junior mortgage before resorting to the part on which the latter relies, is, however, only applicable where it does not prejudice the rights of him who is entitled to the double fund, and does no injustice to the common debtor, nor operate inequitably upon the interests of other persons.[3] Where such would be the effect, equity would apportion the first mortgage-debt ratably between the two estates.[4]

Vt. 70; Blair *v.* Ward, 2 Stockt. Ch. 126; Dickson *v.* Chorn, 6 Iowa, 32. But it seems to be difficult to apply this doctrine in those States where the remedy of the mortgagee is by a suit at law in obtaining possession of the mortgaged premises, and the equity is foreclosed by mere lapse of time. When he took his mortgage upon two parcels, the mortgagee had a clear right to recover either or both at his election. And it is difficult to see how he should be deprived of this by the mortgagor's making a second mortgage to a stranger of the most desirable of the two parcels, though the other may be of sufficient marketable value to satisfy the mortgage-debt. Besides, it is always in the power of the second mortgagee, by redeeming the first mortgage, to be substituted to the rights of the first mortgagee in respect to both parcels of estate. See Adams, Eq. 4 Am. ed. 272, and note; Fisher, Mortg. 395, in which it is also said, "But the court will not interfere with the first mortgagee's right to take his debt out of that part of his security which first becomes available, upon the ground that other funds are comprised in his security;" and cites Wallis *v.* Goodyear, 20 Jur. 179. See also Averall *v.* Wade, Lloyd & G. Cas. temp. Sugden, 255.

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[1] Bank of South Carolina *v.* Mitchell, Rice, Eq. 389.

[2] Cheeseborough *v.* Millard, 1 Johns. Ch. 409.

[3] Ayers *v.* Husted, 15 Conn. 516, per Storrs, J. See Pettibone *v.* Stevens, Id. 19; Butler *v.* Elliott, Id. 187; Henshaw *v.* Wells, 9 Humph. 568; Evertson *v.* Booth, 19 Johns. 486; Conrad *v.* Harrison, 3 Leigh, 532; York & Jersey Steamboat Co. *v.* Jersey Co., 1 Hopk. Ch. 460; Clarke *v.* Bancroft, 13 Iowa, 327.

[4] Barnes *v.* Racster, 1 Younge & C. Ch. 401. See Logan *v.* Anderson, 18 B. Mon. 114.

*SECTION IX. [*577]

OF ACCOUNTING BY THE MORTGAGEE.

1. When he may be called on to account.
2–5. How account taken, and for what.
6. How far first is accountable to subsequent mortgagees.
7, 8. How rents, &c., to be applied.
9–12. For what mortgagee may charge.
10. Of insurance upon mortgaged premises.
11. Mortgagee not bound to repair.
13. Of allowing interest.
14–16. Of applying rents in accounting.

1. If the mortgagor undertakes to exercise his right of redeeming the mortgaged estate, it becomes necessary to ascertain the amount that is due thereon. If the mortgagee shall have been in possession of the premises, it becomes the right of the mortgagor and the duty of the mortgagee that the latter should render an account of his claim, in which he, as a regular rule, charges the amount of the debt and interest secured by the mortgage, and credits the estate with whatever rents and profits thereof he ought to allow, over and above reasonable expenditures for taxes, repairs, and other necessary expenses, on account of the estate. Nor will the court allow parol evidence of a stipulation that the rents received by the mortgagee in possession shall not be accounted for.[1] And where there were a first and second mortgage in the hands of different mortgagees, and the holder of the first was in possession, it was held that the second might hold the first to account for the rents, &c., of the entire estate. And the mortgagee will not be charged with the rents after taking formal possession, if the mortgagor, or any one standing in his place, receive them.[2] If one hold a mortgage, subject to the mortgagor's homestead right, upon premises in possession of a prior mortgagee, who holds independent of such homestead claim, he may call on such prior mortgagee to account for

[1] Coote, Mortg. 353, 354; Davis *v.* Lassiter, 20 Ala. 561.
[2] Bailey *v.* Myrick, 52 Me. 136.

profits, although the rights of the second were subordinate to such right of homestead in the mortgagor.[1]

2. As these proceedings are in equity, this account is taken under the direction of a master in chancery. And the mortgagee in possession is regarded somewhat in the light of a trustee for the mortgagor in respect to the estate, being under obligation to account from the time he takes possession of it.[2] But ordinarily mortgagees, by receiving the rents and profits of mortgaged premises, do not become thereby the debtors of the mortgagor, or liable to be sued for the recovery of the same. And where a mortgagee in possession let the premises to another upon an agreement to pay rent and not commit waste, and the mortgagor redeemed, it was held that he could not sue the mortgagee's tenant upon this agreement. The mortgagor's remedy for rents, &c., is in equity, by having the same accounted for in a process to redeem.[3] But in Massachusetts, if the mortgagee has received in rents more than the mortgage-debt, the court may, in a suit for redemption, award judgment and execution for the balance due the plaintiff in such suit.[4] And the report of a master as to the allowance to a mortgagee for repairs and improvements is conclusive, unless a mistake clearly appear.[5]

3. A mortgagee is always bound to account for the rents he actually receives, and sometimes for what it can be shown he might have received. A much greater degree of stringency in holding him to account is applied where he enters and occupies before condition broken, than where, by the laches of the mortgagor in not paying the debt when due, the [*578] mortgagee is compelled * to take possession for his own protection. Nor can he charge for repairs beyond what is necessary for the preservation of the estate.[6] In England, the rule as to accounting by the mortgagee seems

[1] Richardson *v.* Wallis, 5 Allen, 78.

[2] Coote, Mortg. 355, 366; Powell, Mortg. 946, 948 a, n.; Hunt *v.* Maynard, 6 Pick. 489; Gibson *v.* Crehore, 5 Pick. 146; *ante*, p. *522.

[3] Seaver *v.* Durant, 39 Vt. 105.

[4] Gen. Stat. c. 140, § 28.

[5] Adams *v.* Brown, 7 Cush. 220; Boston Iron Co. *v.* King, 2 Cush. 400.

[6] Ruby *v.* Abyssinia Soc., 15 Me. 306. By statute he is in such case to account for the clear rents and profits. Me. Rev. St. 1857, c. 90, § 2; 1871, c. 90, § 2; Mass. Gen. St. c. 140, § 15.

to be exceedingly stringent. Among the recent cases was one where A mortgaged an estate which contained coal, but no mine had been opened within it. Without taking formal possession, the mortgagee suffered two other persons to enter upon the estate and explore for coal, and work it, they owning mines upon land adjoining the mortgaged estate; and working from their own mine into the premises. Under this permission they extracted large quantities of coal through their own mines from the mortgaged estate; and upon the mortgagor undertaking to redeem, the court held the mortgagee accountable for the coal taken, upon the ground that "a mortgagee who holds property in pledge is accountable for it in its integrity;" "the mortgagee who allows a stranger to deal with the mortgaged property is responsible to the mortgagor in this court for any damage that may accrue by reason of such dealing." And the mortgagee, in this case, was held to account for the full value of the coal taken, without any allowance for the cost of working it and getting it to market.[1]

4. Where he takes possession for condition broken, he is only accountable for what he actually receives as rents and profits, or might receive by the exercise of reasonable care and diligence. Nor will he be charged for rents lost without his own fault. And, as a general proposition, he will not be charged with rents unless he has received them, nor be answerable for waste committed by a tenant by digging up the soil, if done without his knowledge and assent, nor for reasonable estovers of wood burned upon the premises.[2] But in Pennsylvania, it was held that a mortgagee in possession is liable for waste as well as for profits of the land.[3] His duty, where possession is taken in such a case, is said to be that of a provident owner.[4] But he may not turn off a good tenant,

[1] Hood *v.* Easton, 2 Giffard, 692. See also Thorneycroft *v.* Crockett, 16 Sim. 445.

[2] George *v.* Wood, 11 Allen, 42; Hubbard *v.* Shaw, 12 Allen, 122; Miller *v.* Lincoln, 6 Gray, 556; Richardson *v.* Wallis, 5 Allen, 80; Gerrish *v.* Black, 104 Mass. 400.

[3] Guthrie *v.* Kahle, 46 Penn. 333; Givens *v.* M'Calmont, 4 Watts, 460.

[4] Powell, Mortg. 949; Coote, Mortg. 555–557; Robertson *v.* Campbell, 2

or refuse a higher rent, without becoming thereby responsible for the rent lost.[1] So if he assigns the premises to an insolvent, and puts him into possession, he may be charged with the rent if the mortgagor redeems.[2] The rule in such cases is stated to be: "Where a mortgagee enters, he is to take the fair rents and profits of the land, but is not bound to engage in any speculations for the benefit of his mortgagor, but is only liable for wilful default."[3] Nor will he be charged with higher rent than that received under a fair bargain, although, after having entered into it with his tenant, the solicitor of the mortgagor might offer him a larger sum.[4] Accordingly, if the premises are subject to a lease, and he enters and claims the rents, he will be charged with the same at the rate at which they are reserved.[5] If he enter and occupy the premises himself, he will be charged at the full value of the premises.[6]

[*579] *5. But he will not be charged for rents and profits before he enters,[7] nor for rents upon permanent improvements made by himself.[8] Though it was held otherwise where he had been paid the expense of them by their use,[9] and where they have been made by a wrongful occupant,

Call, 421; Anonymous, 1 Vern. 45; Hughes *v.* Williams, 12 Ves. 493; Saunders *v.* Frost, 5 Pick. 259; Shaeffer *v.* Chambers, 2 Halst. Ch. 548; Benham *v.* Rowe, 2 Cal. 387; Van Buren *v.* Olmstead, 5 Paige, Ch. 9; Hogan *v.* Stone, 1 Ala. 496; Bainbridge *v.* Owen, 2 J. J. Marsh. 463; Sparhawk *v.* Wills, 5 Gray, 429; Richardson *v.* Wallis, 5 Allen, 78; Strong *v.* Blanchard, 4 Allen, 538, 544; Fisher, Mortg. 491.

[1] Hughes *v.* Williams, 12 Ves. 493; Anonymous, 1 Vern. 45; Coote, Mortg. 557; Powell, Mortg. 949 a.

[2] Coote, Mortg. 561; Hagthorp *v.* Hook, 1 Gill & J. 270; Neale *v.* Hagthorp, 3 Bland, 590; Miller *v.* Lincoln, 6 Gray, 556, where the mortgagee was exonerated from such a charge for sufficient time to expel the insolvent by legal process, and obtain a responsible tenant. Thayer *v.* Richards, 19 Pick. 398.

[3] Hughes *v.* Williams, 12 Ves. 493; Powell, Mortg. 950; Fisher, Mortg. 492.

[4] Hubbard *v.* Shaw, 12 Allen, 123.

[5] Trimleston *v.* Hamill, 1 Ball & B. 385.

[6] Gordon *v.* Lewis, 2 Sumn. 143; Trulock *v.* Robey, 15 Sim. 265; Holabird *v.* Burr, 17 Conn. 556; Kellogg *v.* Rockwell, 19 Conn. 446; Trimleston *v.* Hamill, 1 Ball & B. 379, 385; Montgomery *v.* Chadwick, 7 Iowa, 134.

[7] Chase *v.* Palmer, 25 Me. 341; Powell *v.* Williams, 14 Ala. 476.

[8] Bell *v.* Mayor of New York, 10 Paige, Ch. 49; Moore *v.* Cable, 1 Johns. Ch. 385; Montgomery *v.* Chadwick, 7 Iowa, 134.

[9] Givens *v.* M'Calmont, 4 Watts, 460.

or by a purchaser under the mortgagor.[1] And where the mortgagee of wild land cleared and cultivated it, he was charged with the improved rent arising from such clearing.[2] And where the mortgagee took a conveyance from the mortgagor and entered under it, the premises then being under attachment at a suit against the mortgagor, upon which the equity of redemption was afterwards sold, it was held that the mortgagee was not accountable for the rents of the premises to the purchaser of the equity until he had entered under the levy.[3]

6. As subsequent incumbrancers are interested, just as the mortgagor is himself, in the question of how far a prior mortgagee shall be charged, since they may be obliged to redeem from him in order to avail themselves of their security, whatever has been laid down in respect to the mortgagor applies as to them if they undertake to redeem. There may be, moreover, cases where the first mortgagee, by some arrangement with the mortgagor, permits him to take the rents, and does not take them himself. And questions have arisen, whether and how far a mortgagee who has taken possession, and suffers the mortgagor to take the rents and profits, is chargeable therefor to subsequent mortgagees. The rule, as given by Powell, is this: "If the mortgagee enter upon the estate, and thereby keep other incumbrancers, of whose liens he has notice, out, he will be charged with all the profits he hath or might have received after his entry." "And if a mortgagee permit the mortgagor to make use of his incumbrance to keep out other creditors, he will be charged with the profits from the time that they would have had a remedy, had it not been for his interposition; for equity will not suffer a man to make use of his securities to protect a debtor from the just demands of his creditors." And Coote says: "If a mortgagee acts *mala fide*, either with regard to subsequent incumbrancers or creditors of the mortgagor, he will be personally responsible; as, for example, if he permit the mortgagor to make use of his mortgage as the * first [*580]

[1] Merriam *v.* Barton, 14 Vt. 501; Stoney *v.* Shultz, 1 Hill, Ch. 464.

[2] Morrison *v.* M'Leod, 2 Ired. Eq. 108.

[3] Lamson *v.* Drake, 105 Mass. 569.

incumbrancer to keep out other creditors."[1] The law as established in Massachusetts upon this point will be explained by the following case: One Fitts made a mortgage to the Boston Bank. Judgment and a writ of possession for condition broken was obtained upon the same; and before the writ was served, the bank assigned it to one Dunbar. The mortgage was dated 1803, the judgment in 1830, and the assigment in 1831. In 1824, Fitts, the mortgagor, sold the estate to Fitts, Jr., a brother-in-law of Dunbar, the consideration of the deed being an agreement on the part of Fitts, Jr., to support the grantor and his wife, the performance of which was secured by a mortgage of the premises by Fitts, Jr., to his father, the grantor. On the 3d December, 1836, Fitts, Jr., for the purpose of preventing his creditors from attaching the crops, gave Dunbar possession of the premises, and a certificate of the defendant's taking peaceable possession was indorsed on the assigned mortgage, and recorded in the registry of deeds on the 2d January, 1837. There was no agreement made as to said Fitts, Jr., accounting with Dunbar for the rents and profits, but it was understood that he should occupy the farm in the same manner as he had done before, and that the taking of possession was for the purpose of protecting the crops from attachment. In Massachusetts, one mode of taking possession of mortgaged premises with a view to a foreclosure, and which, being followed by three years' peaceable holding, for ever forecloses the right of redemption, is by making open and peaceable entry thereon, a memorandum or certificate thereof being made on the mortgage-deed, and within thirty days thereafter recorded in the registry of deeds where the mortgage has been recorded.[2] One Charles, in the present case, held a mortgage upon the premises made by Fitts, Jr., in 1829, and offered to redeem from the bank the mortgage held by Dunbar, and, upon a bill for that [*581] purpose, insisted that Dunbar should be charged * with the rents from the time of his having made his entry

[1] Powell, Mortg. 949 b, and 951 a; Coote, Mortg. 557; Flint, Real Prop. 238; 2 Cruise, Dig. 88; Coffring *v.* Cook, 1 Vern. 270; Chapman *v.* Tanner, 1 Vern 267; Gibson *v.* Crehore, 5 Pick. 146; Acland *v.* Gaisford, 2 Madd. 28.

[2] Mass. Gen. Stat. 1860, c. 140, §§ 1, 2.

and recorded the certificate thereof. But the court rejected the claim. No case is cited by the court sustaining their opinion, though reference is made to the language of the statute, and the conclusion of their opinion is in these words: "Nor do we think that the purpose of the formal entry, namely, to aid the mortgagor in withholding from the attachment of other creditors the produce of the farm, affects the present question. If the possession was not in the mortgagee, the creditors might have made valid attachments of the produce of the farm. They did not interfere, however; and we think the purpose of the first mortgagee's entry does not enlarge the rights of the second mortgagee as against the first, nor authorize the second to charge the first with the use and income of the premises during the time that the mortgagor actually retained the possession." It would seem, therefore, that the principle, that a mortgagee may take possession of mortgaged premises for the purpose of preventing the creditors of the mortgagor attaching the crops, without thereby becoming liable to account for the rents to after-mortgagees, who, after yielding to the statute evidence of the first mortgagee's possession, may seek to redeem, is to be regarded as the local law of Massachusetts.[1]

7. It was, on the other hand, held by the same court, that if one owns the equity of redemption of a mortgaged estate, and also holds one of several mortgages upon the same, and makes an entry under his mortgage and receives the rents of the premises, he is not at liberty to say that he takes them as mortgagor, but shall account for them to any one redeeming the estate as mortgagee.[2] And a second mortgagee, having satisfied a prior mortgage, upon which the mortgagee has received rents, may, after notice, claim of such first mortgagee any surplus of rents remaining in his hands not yet fully accounted for to the mortgagor, so far as the same are necessary to satisfy his own mortgage.[3]

[1] Charles *v.* Dunbar, 4 Met. 498. See 7 Law Rep. 22. In Richardson *v.* Wallis, 5 Allen, 80, the court seemed inclined to limit the doctrine of Charles *v.* Dunbar to cases of simple entry by the mortgagee for purposes of foreclosure, without implying that this may be successfully made an instrument of fraud.

[2] Gibson *v.* Crehore, 5 Pick. 146.

[3] Gordon *v.* Lewis, 2 Sumn. 143.

[*582] *8. If a mortgagee continue to hold possession, or receive rents of the estate after his debt has been satisfied, he will be accountable for such rent, together with interest thereon.[1]

9. Among the items of charge which a mortgagee in possession may make against the estate, when called upon to render an account for purposes of redemption, is the expense of keeping the premises in repair. But this does not extend to additions to the estate, nor to new and ornamental improvements; and, even as to repairs, they must be such as benefit it.[2] The rule given in the court of Pennsylvania is, that he may not charge for costly or permanent improvements without the assent of the mortgagor, but would be restricted to such only as would preserve the estate from dilapidation;[3] unless additions like buildings are put up on the premises by the mortgagees, by the consent and agreement of the mortgagor that the mortgagee might hold them for security under the mortgage.[4] The test as to allowing for improvements seems to be, whether they are necessary to the convenient occupation of the estate. Thus the cost of an aqueduct was allowed which was necessary for supplying water;[5] while expenses in merely increasing the speed of a mill, but not necessary to its operating in its accustomed manner, were disallowed.[6] In one case, a mortgagee was allowed for large sums expended in working a mine which he had a right to work.[7] In another, expenses incurred in opening a mine were

[1] Powell, Mortg. 948 a, note.

[2] Lowndes *v.* Chisolm, 2 McCord, Ch. 455; Hagthorp *v.* Hook, 1 Gill & J. 270; Quinn *v.* Brittain, 1 Hoff. Ch. 353; Russell *v.* Blake, 2 Pick. 505; Reed *v.* Reed, 10 Pick. 398; Moore *v.* Cable, 1 Johns. Ch. 385, where a claim for clearing wild lands was disallowed; Dougherty *v.* McColgan, 6 Gill & J. 275; Hopkins *v.* Stephenson, 1 J. J. Marsh. 341; Woodward *v.* Phillips, 14 Gray, 132; Strong *v.* Blanchard, 4 Allen, 544; Mass. Gen. Stat. 1860, c. 140, § 15; Fisher, Mortg. 495.

[3] Harper's Appeal, 64 Penn. St. 315.

[4] Crafts *v.* Crafts, 13 Gray, 363.

[5] Saunders *v.* Frost, 5 Pick. 259; McCarron *v.* Cassidy, 18 Ark. 34; Mickles *v.* Dillaye, 17 N. Y. 80; Gordon *v.* Lewis, 2 Sumn. 143; Lowndes *v.* Chisolm, 2 McCord, Ch. 455; McConnel *v.* Holobush, 11 Ill. 61; Sparhawk *v.* Wills, 5 Gray, 423; Tharp *v.* Feltz, 6 B. Mon. 15; McCumber *v.* Gilman, 15 Ill. 381.

[6] Clark *v.* Smith, Saxton (N. J.), 121.

[7] Norton *v.* Cooper, 39 E. L. & Eq. 130.

disallowed.[1] While in another, the mortgagee in possession, having cleared land and erected a mill thereon, and having derived profit enough from running it to reimburse him for his expenses, was charged with the rent of the premises in their improved condition.[2] The rules upon this subject do not seem to be uniform. In some of the States, a mortgagee is allowed to charge for beneficial and lasting improvements.[3] *And this is sometimes the case even in [*583] England.[4] And such would probably be uniformly the rule where the mortgagee in making such improvements supposed himself to be the absolute owner,[5] or the person who made them was an innocent purchaser,[6] or did it by consent and agreement of the mortgagor.[7] Or where the mortgagor, knowing they were being made, and having an opportunity so to do, made no objection.[8] If a mortgagee in possession is subjected to expenses in defending the title to the estate, he may charge for any sum reasonably incurred in so doing,[9] including counsel fees necessarily paid in collecting the rents and profits of the premises, but not in prosecuting his claim against the mortgagor,[10] and for discharging prior incumbrances.[11] But a stipulation in a mortgage was held good whereby the mortgagee might charge a reasonable attorney's fee, if he was obliged to resort to legal process to foreclose the mortgage.[12] So he may charge for the sums paid for taxes upon the premises, as well as for assessments which he has

[1] Thorneycroft *v.* Crockett, 16 Sim. 445.

[2] Givens *v.* M'Calmont, 4 Watts, 463.

[3] Bollinger *v.* Chouteau, 20 Mo. 89; Ford *v.* Philpot, 5 Harr. & J. 312.

[4] Exton *v.* Greaves, 1 Vern. 138; Talbot *v.* Brodhill, Id. 183, n.

[5] McConnel *v.* Holobush, 11 Ill. 61; Neale *v.* Hagthorp, 3 Bland, 590; Thorne *v.* Newman, Cas. temp. Finch, 38; Mickles *v.* Dillaye, 17 N. Y. 80.

[6] Bradley *v.* Snyder, 14 Ill. 263.

[7] Cazenove *v.* Cutler, 4 Met. 246; McSorley *v.* Larissa, 100 Mass. 272.

[8] Montgomery *v.* Chadwick, 7 Iowa. 135.

[9] Godfrey *v.* Watson, 3 Atk. 518; Powell, Mortg. 986, n.; Hagthorp *v.* Hook, 1 Gill & J. 270; Coote, Mortg. 354; Clark *v.* Smith, Saxton (N. J.), 121; Miller *v.* Whittier, 36 Me. 577; Riddle *v.* Bowman, 7 Fost. (N. H.) 236; McCumber *v.* Gilman, 15 Ill. 381.

[10] Hubbard *v.* Shaw, 12 Allen, 122; Boston, &c. Railroad *v.* Haven, 8 Allen, 362.

[11] Page *v.* Foster, 7 N. H. 392; Fisher, Mortg. 494.

[12] Weatherby *v.* Smith, 30 Iowa, 131.

been obliged to pay in order to preserve the security.[1] If, however, the land be lost by failure to pay the tax upon it, the mortgagor cannot charge the loss upon the mortgagee.[2] But as a general proposition, if no provision is made in the mortgage for insuring the premises, a mortgagee has no right to charge in his account for premiums paid for effecting insurance upon the mortgaged premises.[3] In Slee *v.* Manhattan Co., where the mortgagees had long been in possession of the premises, the court allowed them to charge for insurance and taxes, and money paid for repairs, "under," as they say, "the peculiar circumstances of the case."[4] But if the condition of the mortgage requires the mortgagor to keep the premises insured for the benefit of the mortgagee, and he fails to do so, the mortgagee may cause insurance to be made, and charge the premium in his account with the estate.[5]

10. In such a case, both the mortgagor and the mortgagee may insure their respective interests. And if the mortgagor insures his, and the property is destroyed, the mortgagee may not claim a right to be subrogated to the benefit of the insurance, unless there be a covenant on the part of the mortgagor to keep the premises insured for the benefit of the [*584] *mortgagee, or that the insurance-money should go to repair them if destroyed.[6] A mortgagor has an insurable interest to the full value of the estate mortgaged.[7] So if the mortgagee insure his interest, and there is a loss, the premium having been paid out of his own funds, he is not

[1] Faure *v.* Winans, 1 Hopk. Ch. 283; Williams *v.* Hilton, 35 Me. 547; Kortright *v.* Cady, 23 Barb. 490; Bollinger *v.* Chouteau, 20 Mo. 89; Mix *v.* Hotchkiss, 14 Conn. 32; Eagle Ins. Co. *v.* Pell, 2 Edw. Ch. 631; Robinson *v.* Ryan, 25 N. Y. 320, 327; Silver Lake Bank *v.* North, 4 Johns. Ch. 370.

[2] Harvie *v.* Banks, 1 Rand. 408.

[3] Saunders *v.* Frost, 5 Pick. 259; Dobson *v.* Land, 8 Hare, 216, s. c. 13 Law Rep. 247; White *v.* Brown, 2 Cush. 412; King *v.* State Ins. Co., 7 Cush. 1; Clark *v.* Smith, Saxton (N. J.), 121; Fisher, Mortg. 493; Boston, &c. Railroad *v.* Haven, 8 Allen, 362.

[4] 1 Paige, Ch. 81.

[5] Fowley *v.* Palmer, 5 Gray, 549; Nichols *v.* Baxter, 5 R. I. 494.

[6] Faure *v.* Winans, 1 Hopk. Ch. 283; De Forest *v.* Fulton Ins. Co., 1 Hall, 103; Carter *v.* Rockett, 8 Paige, Ch. 437; Vandegraaff *v.* Medlock, 3 Porter, 389; Thomas *v.* Vonkapff, 6 Gill & J. 372; Vernon *v.* Smith, 5 B. & Ald. 1; Nichols *v.* Baxter, 5 R. I. 491.

[7] Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40; Nichols *v.* Baxter, *sup.*

bound to account to the mortgagor for any part of the insurance-money, nor to apply it in payment of his debt which is secured by the mortgage.[1] But if insurance be effected at the request and cost of the mortgagor, and for the benefit of the mortgagee and mortgagor, the latter has a right to have the money received applied in discharge of the indebtedness;[2] and in such case, if there be any surplus beyond satisfying the mortgage-debt, the mortgagee holds it in trust for the mortgagor or his assigns. And in such case, if the mortgagor sell his interest in the estate, and a loss happen, the purchaser may require the mortgagee to collect and apply the insurance-money towards the debt, and cancel it so far as it pays.[3] The insurable interest of a mortgagee is measured by the amount of his claim.[4] But it is held by many courts that if a mortgagee recovers to his own use upon a policy of insurance taken in his own name, where the premium has been paid by himself, the insurer is entitled to be subrogated to the right of such mortgagee, in respect to the estate and the mortgage-debt, for an amount corresponding to the insurance paid;[5] though this is denied to be law in Massachusetts.[6] * So

* NOTE. — The case of King *v.* The State Mut. Fire Ins. Co., 7 Cush. 1, involves a principle so practical in its application, and so ably considered by the court, that it seems to be proper to give some of the more prominent points contained in the opinion of Shaw, C. J.: —

"We understand from the statement, and from the policy which is made part of it, that the plaintiff (the mortgagee) made the insurance in his own name, and for his own benefit, not describing his interest as that of mortgagee, and paid the premium out of his own funds." The opinion then goes on to state that the defendants (the Insurance Company) admit the loss by fire, but claim the right of having an assignment of the plaintiff's interest, or such part of it

[1] King *v.* State Ins. Co., 7 Cush. 1; Ætna Ins. Co. *v.* Tyler, 16 Wend. 385; Carpenter *v.* Providence Ins. Co., 16 Pet. 495; White *v.* Brown, 2 Cush. 412; Russell *v.* Southard, 12 How. 139.

[2] Concord, &c. Ins. Co. *v.* Woodbury, 45 Me. 447; Gordon *v.* Ware Savings, &c., 115 Mass. 588.

[3] Graves *v.* Hampden Ins. Co., 10 Allen, 285.

[4] Cases cited above. See also Sussex Ins. Co. *v.* Woodruff, 2 Dutch. (N. J.) 54.

[5] Sussex Ins. Co. *v.* Woodruff, 2 Dutch. (N. J.) 541; Smith *v.* Columbia Ins. Co., 17 Penn. St. 253; Kernochan *v.* New York Bowery Ins. Co., 5 Duer, 1, s. c. 17 N. Y. 428.

[6] King *v.* State Ins. Co., 7 Cush. 1. See Dobson *v.* Land, 8 Hare, 216; Fisher, Mortg. 494; Suffolk Ins. Co. *v.* Boyden, 9 Allen, 123, affirming King *v.* State Ins. Co.; Graves *v.* Hampden Ins. Co., 10 Allen, 283.

where one in Vermont, who held an insurance policy against accidents, was injured by reason of a defect in the highway,

as the amount they would have to pay would bear to the whole mortgage-debt, made to them. The case turned upon the question, whether the defendants had a right to have such assignment made. "The court are of opinion that the plaintiff, having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *prima facie*, a good right to recover; and, having the same insurable interest at the time of the loss which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion, that if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all." "We are inclined to the opinion, both upon principle and authority, that where a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered as a part of the mortgage-debt; it is not a payment in whole or in part; but he still has a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer who has thus paid the loss, or money paid for his use."

"There is no privity of contract or estate, in fact or in law, between the insurer and the mortgagor, but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he cannot, it seems, *a fortiori*, that the insurer cannot claim to charge his loss upon the mortgagor, which he would do if he were entitled to an assignment of the mortgage-debt, either in full or *pro tanto*."

"What, then, is there inequitable on the part of the mortgagee towards either party in holding both sums (the debt and the insurance money)? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent."

"On a view of the whole question, the court are of opinion that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when in point of fact his only insurable interest is that of a mortgagee, in case of a loss by fire before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use." But the insurable interest of the mortgagee is defeated by a payment of the debt by the mortgagor. Graves *v.* Hampden Ins. Co., 10 Allen, 283.

The court also refer to the case of Dobson *v.* Land, 8 Hare, 216, and the comments upon it in the London Jurist, contained in 13 Law Reporter, 247, wherein a point stated in another part of this work was sustained, that a mortgagee has no right to cause the premises to be insured, and charge the same to the estate, in the absence of an express agreement to that effect by the mortgagor when making the mortgage. See Fisher, Mortg. 494.

and for which he recovered damages under his policy from the insurance company, it was held that this recovery was no bar to his action against the town to recover damages for the injury sustained by him.[1]

*An alienation of insured premises usually vacates [*585] a policy by its terms. And by alienation is meant an act whereby one man transfers the property and possession of land or other things to another.[2] And questions have arisen how far this principle *would apply where the [*586] insurance has been effected by a mortgagor intended for the security of the mortgagee of the premises insured. Where this was done by the mortgagor assigning the policy to the mortgagee, who afterwards purchased the mortgagor's interest in the premises, it was held to vacate it.[3] So where the mortgagor assigned the policy to the mortgagee, and subsequently aliened the estate to a third party, it was held to vacate the policy.[4] But where the assignment was made to the mortgagee by consent of the company, who took from the assignee an agreement to pay subsequent instalments, &c., it was held that a subsequent alienation would not defeat the policy in the assignee's hands.[5] Where there is a condition in the mortgage or contract between the parties that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and he fails to do so, the mortgagee may insure and charge the premium to the estate, though in form the policy be for whom it may concern, and payable to the mortgagee.[6] And where the mortgagee is trustee for the mortgagor in respect to the insurance upon the premises, as where the mortgagor effects the insurance payable to the mortgagee, or the mortgagee effects it at the mortgagor's expense and by his consent, whatever is received by the mortgagee thereon must be accounted for towards the mortgage-

[1] Harding *v.* Townshend, 43 Vt. 536.

[2] Boyd *v.* Cudderback, 31 Ill. 119.

[3] Macomber *v.* Cambridge Ins. Co., 8 Cush. 133; Bilson *v.* Manufacturing Ins. Co., U. S. C. C. Pa. 7 Am. Law Reg. 661.

[4] Grosvenor *v.* Atlantic Ins. Co., 17 N. Y. 391.

[5] Foster *v.* Equitable Ins. Co., 2 Gray, 216; Nichols *v.* Baxter, 5 R. I. 494.

[6] Fowley *v.* Palmer, 5 Gray, 549. See Mix *v.* Hotchkiss, 14 Conn. 32.

debt.[1] If a policy of insurance be effected by a mortgagor, payable in case of loss to the mortgagee, the mortga-
[*587] gor cannot sue alone for the loss unless he * has paid the mortgage in full. The action should be in the joint names of mortgagor and mortgagee, or in that of the mortgagee alone.[2]

11. A mortgagee in possession is not bound to incur expense to repair or rebuild dilapidated buildings, or those injured, without his fault, upon the premises.[3] But he may, if he see fit, rebuild in place of old ones gone to decay, for similar uses and purposes, and charge the expense to the estate in rendering his account.[4] And it is generally true, that the mortgagee, if in possession, is bound to keep the premises in proper repair.[5]

12. In respect to a mortgagee's charging for personal services in taking care of the estate, collecting the rents, &c., while in possession, it is held in England that he may not do it in any case except where it is necessary to employ a bailiff to do the business.[6] And the same rule is adopted in New York and Kentucky,[7] while in Massachusetts he may charge a commission (in one case five per cent was allowed) upon the amount of the rents he may collect of others.[8] He cannot,

[1] King *v.* State Ins. Co., 7 Cush. 1; Fowley *v.* Palmer, 5 Gray, 549; Andrews, *Ex parte*, 2 Rose, 410; Larrabee *v.* Lumbert, 32 Me. 97; Graves *v.* Hampden Ins. Co., 10 Allen, 382.

[2] Ennis *v.* Harmony Ins. Co., 3 Bosw. 516.

[3] Campbell *v.* Macomb, 4 Johns. Ch. 534; Dexter *v.* Arnold, 2 Sumn. 125; Gordon *v.* Lewis, Id. 143; Russell *v.* Smithies, 1 Anst. 96; Rowe *v.* Wood, 2 Jac. & W. 553; McCumber *v.* Gilman, 15 Ill. 381.

[4] Marshall *v.* Cave, reported Powell, Mort. 957 a; Fisher, Mortg. 498.

[5] Shaeffer *v.* Chambers, 2 Halst. Ch. 548; Coote, Mortg. 353; Godfrey *v.* Watson, 3 Atk. 517.

[6] Godfrey *v.* Watson, 3 Atk. 517; Bonithon *v.* Hockmore, 1 Vern. 316; Gilbert *v.* Dyneley, 3 Mann. & G. 12; Chambers *v.* Goldwin, 5 Ves. 834; Langstaffe *v.* Fenwick, 10 Ves. 405; Fisher, Mortg. 499.

[7] Breckenridge *v.* Brooks, 2 A. K. Marsh. 335; Moore *v.* Cable, 1 Johns. Ch. 385.

[8] Gibson *v.* Crehore, 5 Pick. 161; Tucker *v.* Buffum, 16 Pick. 46. Though 5 per cent is not a fixed rate. Adams *v.* Brown, 7 Cush. 220; and more was allowed in Boston, &c. R. R. *v.* Haven, 8 Allen, 361. That percentage was allowed for moneys collected, but not upon moneys paid out in Gerrish *v.* Black, 104 Mass. 400.

if he occupy the premises himself, charge any commission for his care and trouble.[1] A similar rule as to allowing a mortgagee to charge for collecting rents applies in Connecticut, Virginia, and Pennsylvania, and probably in other States.[2]

13. In addition to the sums for which a mortgagee may be * chargeable, as above explained, courts some- [*588] times charge him with interest upon the money he may receive, and in special cases even make annual rests in stating his account. The case of his receiving rents after his debt has been satisfied, and being charged interest, has already been stated;[3] and ordinarily, in stating the account, the aggregate of debt and interest thereon will be deducted from the aggregate of the rents received, without allowing annual rests.[4] And such is the rule in Kentucky;[5] while in Massachusetts, if the amount of the rents be considerable, and the interest on the debt is in terms payable semi-annually, the court will make even semi-annual rests in making up the amount.[6] The general rule is, that compound interest is not allowed;[7] though, if the mortgagor has allowed it, he cannot revoke its allowance.[8]

14. Where the mortgagee holds the premises by virtue of several mortgages, the law comes in and applies the rents he may receive while in possession, in the order of their priority; nor can he at his election apply them upon a junior mortgage while holding a prior one.[9]

15. If the mortgagee in possession shall have made repairs upon the premises, and received rents, in making up his account he has a right to apply these rents, first to satisfy the expenses incurred for such repairs, and also towards the taxes

[1] Eaton *v.* Simonds, 14 Pick. 98.

[2] Waterman *v.* Curtis, 26 Conn. 241; Granberry *v.* Granberry, 1 Wash. (Va.) 246; Wilson *v.* Wilson, 3 Binn. 557.

[3] Powell, Mortg. 959, n.; Gordon *v.* Lewis, 2 Sumn. 143; Hogan *v.* Stone, 1 Ala. 496.

[4] Powell, Mort. 958 a, n.

[5] Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, where he manages the estate himself.

[6] Gibson *v.* Crehore, 5 Pick. 146.

[7] Dunshee *v.* Parmelee, 49 Vt. 172; Kittredge *v.* McLaughlin, 38 Me. 513.

[8] Booker *v.* Gregory, 7 B. Mon. 439.

[9] Saunders *v.* Frost, 5 Pick. 259.

paid by him. If there is any balance of rent then remaining, it is to be applied towards the accruing interest upon the mortgage-debt. No part of the rents will be applied to the principal unless they exceed the charges for repairs, taxes, and interest, as above stated. If in any year the rents exceed the interest and charges, there will be a rest made at the end of the year, as the principal will thereby be diminished, and interest be computed * afterwards on the balance.[1] But rests will not ordinarily be allowed to be made when the effect will be to give interest upon any part of the prior interest,[2] even in favor of a purchaser of a mortgage who had paid the full amount of the mortgage-debt and interest, computed to the day of his purchase.[3]

[*589]

16. A mortgagee in possession receiving rents must apply them to the mortgage-debt, and may not apply them to other claims,[4] even though the mortgagor agreed with the mortgagee when he took possession that he might apply them towards another claim on the same land, the mortgagor having become insolvent before any rents had fallen due after possession taken.[5] But a mortgagee is not bound to pay over any part of the rents or profits of the estate, so long as any part of his mortgage-debt remains unpaid.[6]

[1] Shaeffer *v.* Chambers, 2 Halst. Ch. 548; Reed *v.* Reed, 10 Pick. 398; Gibson *v.* Crehore, 5 Pick. 146; Saunders *v.* Frost, 5 Pick. 259; Coote, Mortg. 555; Wilson *v.* Cluer, 3 Beav. 136; Story, Eq. Jur. § 1016.

[2] Finch *v.* Brown, 3 Beav. 70; Blackburn *v.* Warwick, 2 Younge & C. 92; Horlock *v.* Smith, 1 Coll. 287.

[3] Boston Iron Co. *v.* King, 2 Cush. 400.

[4] Wood *v.* Felton, 9 Pick. 171; Harrison *v.* Wyse, 24 Conn. 1.

[5] Hilliard *v.* Allen, 4 Cush. 532, 537.

[6] Bell *v.* Mayor of New York, 10 Paige, Ch. 49.

SECTION X.

OF FORECLOSURE.

1, 2. When and how applied.
3–5. When and how foreclosure may be opened.
5 *a*. Rights of junior mortgagees as to foreclosure
5 *b*. Effect of foreclosure by entry and possession.
6, 7. Of several actions by mortgagee for the debt and estate.
7 *a*. Claim upon purchase-money by lessee of mortgagor.
8, 9. Who are parties to such actions.
10–15. Effect of foreclosure.
16. How far foreclosure works a payment of the debt.

1. THERE is, in respect to all common mortgages, a process by which all further right to redeem is defeated and lost to the mortgagor, and the estate becomes the absolute property of the mortgagee; and this is called a *foreclosure*. Like the right of redemption by the mortgagor, the right of process of foreclosure by the mortgagee may be barred and lost by limitation from the lapse of time. Thus, if the mortgagor has been suffered to *occupy the mortgaged [*590] premises for more than twenty years after the debt is due and payable, without any entry or claim by the mortgagee, it will bar the claim of the latter, on the presumption that he has been paid.[1] So the mortgagee's right to foreclose his mortgage may be defeated by a tender of the debt by the mortgagor in time to save a forfeiture. Where that is done, the mortgage is extinguished; and if the mortgagee after that brings process of foreclosure, the mortgagor may avail himself of such tender in bar without the necessity of bringing the money into court.[2]

2. There are various modes of effecting a foreclosure in the different States. And an agreement in the mortgage itself that it should be foreclosed in any other way than that prescribed by law would be void.[3] The process of foreclosure must conform to the law of the State in which the land is

[1] Howland *v.* Shurtleff, 2 Met. 26; *ante*, p. *559.
[2] Van Husan *v.* Kanouse, 13 Mich. 303.
[3] Chase *v.* McLellan, 49 Me. 378.

situate, in order to be of any validity or effect.[1] The general notion of such a process is derived from the civil law, under which "the general remedy *in rem* was by a sale by the mortgagee of the mortgaged estate, either under a judicial decree or without such decree, by his own voluntary act of sale after a certain fixed notice of the debtor."[2] In England, one mode is by a bill in equity praying for a foreclosure, upon which the court, through a master, ascertains in the manner above described the amount which is due upon the mortgage, and then by decree, that unless the one having the equity of redemption shall within a prescribed term, usually six months, pay that sum and redeem the estate, he shall be for ever barred from redeeming.[3] This is called a *strict foreclosure*. But by the statute 15 & 16 Vict. c. 86, § 48, the court may always direct a sale of the property at the request of either party, instead of decreeing a foreclosure.[4] The usual mode of foreclosure in Illinois is by having the estate sold, giving the mortgagee a certain time in which to redeem from the sale. But it is competent for the court, if the property is an inadequate security for the debt, to apply the doctrine of strict foreclosure, making the sale absolute if the mortgagor fails to redeem within a prescribed time.[5] In Michigan, if one holds several mortgages to secure the same debt, he may foreclose them in succession till his debt is satisfied.[6] It seems to be essential to the validity of a decree for strict foreclosure, that it should give the mortgagor a certain time within which, after the decree, he may redeem the premises. And this doctrine is applied in Kansas, unless there be a suit by the mortgagee against the mortgagor to ascertain the amount due; and the court render a special order that the premises shall be sold upon *fieri facias*, as may be done.[7]

3. In a strict foreclosure the mortgagee takes the whole estate, the effect of such a proceeding being merely to extin-

[1] Elliot *v.* Wood, 45 N. Y. 77. [2] Story, Eq. Jur. § 1024.

[3] Daniell, Ch. Pract. 1204; Coote, Mortg. 511.

[4] Wms. Real Prop. 356. The reader will find a statement of the respective advantages of the one form or the other of defeating the right of redemption in Lansing *v.* Goelet, 9 Cow. 382, by Chancellor Jones.

[5] Farrell *v.* Parlier, 50 Ill. 275, 276; Sheldon *v.* Peterson, 55 Ill. 507.

[6] McKinney *v.* Miller, 19 Mich. 152. [7] Clark *v.* Reyburn, 8 Wall. 323.

guish the right of redemption.[1] So where, instead of a strict foreclosure, the estate is sold to the highest bidder by a master, as is done in New York, the effect is the same in cutting off and extinguishing the equity of redemption, and leaves the title conveyed by the mortgage absolute.[2] But it seems that a strict foreclosure may be resorted to in New York; but it is not favored by the courts, being regarded as a severe remedy.[3] But the owner of the equity has a right to the rents until the purchaser under the decree is entitled to possession of the premises under a deed duly delivered.[4] When the mortgage is foreclosed by sale under a decree of the court, the mortgagor's title passes to the purchaser, upon the consummation of the sale by the master's or sheriff's deed, and the court of equity under whose decree the sale was made will enforce it by giving the purchaser possession.[5] So where the mortgage is foreclosed, as in Pennsylvania, by a sheriff's sale, the title of the purchaser relates back to the date of the mortgage.[6] Foreclosure in Pennsylvania is effected by a process of *scire facias*, and a judgment and sale of the estate thereon, which passes an unincumbered title to the purchaser.[7] And in New York, the mortgagor's right of redemption is foreclosed by the sale by the master, and is not suspended till the deed is actually delivered, nor is a deed essential to such foreclosure.[8] And in a like case and proceedings in Wisconsin, the sale made under the decree of court passes the entire interest of the mortgagor and mortgagee.[9] If the mortgage is foreclosed, the estate which was conditional and defeasible

[1] Brainard *v.* Cooper, 10 N. Y. 359; Bradley *v.* Chester Valley R. R. Co., 36 Penn. St. 150.

[2] Packer *v.* Rochester & Syr. R. R. Co., 17 N. Y. 287; Lewis *v.* Smith, 5 Seld. 515, 516. So in Iowa, Kramer *v.* Rebman, 9 Iowa, 114; Shricker *v.* Field, Ib. 366.

[3] Bolles *v.* Duff, 43 N. Y. 474.

[4] Clason *v.* Corley, 5 Sandf. S. C. 447; Whalin *v.* White, 25 N. Y. 464.

[5] Montgomery *v.* Tutt, 11 Cal. 192; Kershaw *v.* Thompson, 4 Johns. Ch 609.

[6] De Haven *v.* Landell, 31 Penn. St. 124. See also Shores *v.* Scott River Co., 21 Cal. 139.

[7] Hinds *v.* Allen, 34 Conn. 193.

[8] Tuthill *v.* Tracy, 31 N. Y. 157; Brown *v.* Frost, 10 Paige, 243.

[9] Tallman *v.* Ely, 6 Wis. 244; Hodson *v.* Treat, 7 Wis. 263, 278

in its creation becomes absolute, and the incidents, privileges, and covenants attached to it, unchanged by any thing which the mortgagor or any other person may have done in the mean time, remain attached to it as if the original conveyance had been absolute.[1] But a sale upon a junior mortgage cannot affect the rights of a prior mortgagee. It can only be subordinate to any prior and paramount security.[2] By a strict foreclosure, the mortgagee acquires no new estate or rights. It merely cuts off the right of the mortgagor to the estate, and interposes a perpetual bar against the party foreclosed. He would not therefore acquire a right of the mortgagor to redeem from a second mortgage. His rights, in this respect, would differ from what they would be upon a judicial sale, or an express grant from the mortgagor.[3] So where the foreclosure is by sale of the premises, as in New York, and the mortgage embraces a large tract of land on which the mortgagor, after making such mortgage, laid out a village into house-lots, with streets, &c., and sold the same to sundry individuals, the mortgagee, in seeking to foreclose them, would not be obliged to have the premises sold in parcels as laid out, or to abandon his rights as mortgagee to the land covered by the streets, &c.[4] But where the mortgage covered a large and valuable estate, and, upon making sale of it to foreclose it, a junior mortgagee requested the prior mortgagee to sell only so much of the estate as was sufficient to satisfy his claim, and offered to bid and pay for a part thereof indicated, enough to satisfy the first mortgage, but this was declined, and the whole estate was sold, it was held to be irregular and invalid.[5] If the decree be for a strict foreclosure, the mortgagee being out of possession, he is obliged to resort to an action of ejectment to recover possession; whereas, if it be by sale under a judicial decree, the court may compel the mortgagor to surrender possession.[6] But in what has been

[1] Ritger *v.* Parker, 8 Cush. 149. See Burton *v.* Lies, 21 Cal. 91.

[2] Galveston R. R. *v.* Cowdrey, 11 Wall. 476; Wolcott *v.* Spencer, 14 Mass. 412.

[3] Goodman *v.* White, 26 Conn. 322.

[4] Griswold *v.* Fowler, 24 Barb. 135.

[5] Ellsworth *v.* Lockwood, 42 N. Y. 96.

[6] Schenck *v.* Conover, 13 N. J. 220; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Montgomery *v.* Middlemiss, 21 Cal. 106.

said, it has been assumed that the decree by which the foreclosure is effected has been rendered after due notice to subsequent mortgagees, or their assigns, whose mortgages or assignments have been recorded, since, unless so notified, such foreclosure does not bind them or affect their rights unless made parties to the proceedings.[1] Sometimes, in England, this foreclosure is opened, and the time of redemption enlarged, under the general discretion which the court there exercises; and this has been done after the expiration of sixteen years from the time of the decree.[2] And it is held, that the effect of certain acts of a mortgagee who has obtained a strict foreclosure will open it, and let in the mortgagor to redeem. As, for instance, if the mortgagee, on the ground that the estate is of less value than the amount of his debt, sues the mortgagor to recover the balance alleged to be due, he opens the redemption in England and in *most [*591] of the States.[3] But this does not apply to cases where the estate has been sold by way of foreclosure,[4] nor to cases of debts payable in instalments, where there has been a foreclosure for the non-payment of one of those, and a subsequent suit is brought to recover a second instalment.[5]

4. Independent of its effect upon the opening of a foreclosure, it seems to be a right which a mortgagee may, in all cases, exercise, to sue the mortgagor upon the original mortgage-debt, and recover the difference between the value of the foreclosed mortgaged property and the amount of the debt, treating the foreclosure as a payment *pro tanto*.[6] But

[1] Winslow *v.* McCall, 32 Barb. 243; Packer *v.* Rochester & Syr. R. R. Co., 17 N. Y. 288; Frink *v.* Murphy, 21 Cal. 111.

[2] Daniell, Ch. Pract. 1205; Coote, Mortg. 515.

[3] Lockhart *v.* Hardy, 9 Beav. 349; Coote, Mortg. 516; Mass. Gen. Stat. c. 140, § 36; Den *v.* Tunis, 1 Dutch. (N. J.) 633; Andrews *v.* Scotton, 2 Bland, 666; Powell, Mortg. 1003.

[4] Dunkley *v.* Van Buren, 3 Johns. Ch. 330; Andrews *v.* Scotton, 2 Bland, 666.

[5] Wilson *v.* Wilson, 4 Iowa, 309.

[6] Now by statute in Connecticut. Rev. Stat. 1849, p. 341; 1875, tit. 18, c. 7, § 2, though formerly otherwise; Derby Bank *v.* Landon, 3 Conn. 62; Swift *v* Edson, 5 Conn. 531; Globe Ins. Co. *v.* Lansing, 5 Cow. 380; Hatch *v.* White, 2 Gallis. 152; Powell, Mortg. 1002; Amory *v.* Fairbanks, 3 Mass. 563; West *v.* Chamberlain, 8 Pick. 336; Leland *v.* Loring, 10 Met. 122; Souther *v.* Wilson

where a mortgage was made to secure the purchase-money, and the mortgagee undertook to foreclose it, the mortgagor was allowed to show that the grantor, knowing the quantity of the land conveyed, falsely represented it to be greater than it was, whereby the mortgagor was induced to give a note for a larger sum than was, in fact, due, and the excess was deducted from the amount which the terms of the mortgage required to be paid to redeem the estate from foreclosure, although the deed contained no covenants as to the quantity of the land, but conveyed it as supposed to be so many acres more or less.[1]

5. If the mortgagee acknowledges a satisfaction of the debt upon the back of the mortgage-deed before the same is foreclosed, it operates as a discharge of it. And in some cases the receipt by a mortgagee of a part of the mortgage-debt in the way of payment, after a foreclosure, is held to be a waiver of such foreclosure.[2] Where a purchaser at a foreclosure sale agrees with the mortgagor to extend the time of redemption from such sale beyond the time fixed by statute, he will be held to stand as mortgagee of the estate, and the same may be redeemed accordingly.[3] And a tender may have that effect when made under an agreement on the part of the mortgagee, that, if the debt is paid by a certain time, no advantage shall be taken of the foreclosure.[4] And the acceptance of the full amount of the mortgage-debt is conclusive evidence of the waiver of a prior foreclosure.[5] So where, as in Massachusetts, the mortgagee may enter *in pais*, or under a judgment of court, and hold possession a certain [*592] length of time, and thereby foreclose the * mortgage, if, after having entered and held possession for the purpose of foreclosure, he brings his action at law to recover possession, he waives the effect of his prior entry.[6]

29 Me. 56; Langdon *v.* Paul, 20 Vt. 217; Hunt *v.* Stiles, 10 N. H. 466; Smith *v* Packard, 19 N. H. 575; Dunkley *v.* Van Buren, 3 Johns. Ch. 330; Lansing *v.* Goelet, 9 Cow. 346; Porter *v.* Pillsbury, 36 Me. 278; Paris *v.* Hulett, 26 Vt. 308; Patten *v.* Pearson, 57 Me. 434.

[1] Twichell *v.* Bridge, 42 Vt. 68.

[2] Lawrence *v.* Fletcher, 10 Met. 344; Deming *v.* Comings, 11 N. H. 474.

[3] Pensoneau *v.* Pulione, 47 Ill. 58.

[4] McNeill *v.* Call, 19 N. H. 403.

[5] Batchelder *v.* Robinson, 6 N. H. 12.

[6] Fay *v.* Valentine, 5 Pick. 418.

5 *a*. In Massachusetts, the remedy of the mortgagee to foreclose his mortgage is by an entry *in pais*, or by a suit by a writ of entry, in which he recovers a judgment for possession of the mortgaged premises, if, within a certain prescribed time, the debt is not paid. A writ of *habere facias* thereupon issues, and the mortgagee is put into possession, which possession gained in either way, if continued a certain prescribed period of time, three years, works a foreclosure. But making and recording an entry for a breach of condition, and a lapse of three years, does not estop the mortgagor from showing that the condition had not been broken when it was made.[1] A mortgagee may, however, sue a writ of entry for possession at common law, and recover judgment accordingly, if neither party set up the mortgage.[2] But until he shall have made an entry under his mortgage in some form, he cannot give authority to a stranger to occupy the premises so as to protect him against the claim of the owner of the equity to possession.[3] If a mortgagor certifies to an entry made by the mortgagee for condition broken in form required by law, and this is recorded, it is notice to all concerned; and whoever purchases the equity of redemption would be bound by it, and would not be at liberty to controvert it on the ground of fraud.[4] This right of foreclosing by an entry made by the mortgagee does not extend to a married woman whose husband is the mortgagor.[5] It may be effectual if made in the presence of witnesses, although the certificate of the fact omits to state that it was done in an open and peaceable manner.[6] In New Hampshire, if the mortgage embrace several parcels of wild land, an entry upon one in the name of the whole would be sufficient to gain a seisin of them all.[7] And the same rule is adopted in Massachusetts. If a mortgage covers two parcels of land, an entry on one is sufficient.[8] An entry to foreclose in Massachusetts is held to be *peaceable*, if not opposed by any one claiming the land; and *open*, if made in the presence

1 Pettee *v.* Case, 11 Gray, 478.
2 Treat *v.* Pierce, 53 Me. 77; Lawrence *v.* Stratton, 6 Cush. 170.
3 Silloway *v.* Brown, 12 Allen, 38; Mayo *v.* Fletcher, 14 Pick. 531.
4 Taylor *v.* Dean, 7 Allen, 253. 5 Tucker *v.* Fenno, 110 Mass. 311.
6 Hawkes *v.* Brigham, 16 Gray, 564. 7 Green *v.* Pettengill, 47 N. H. 375.
8 Hawkes *v.* Brigham, 16 Gray, 565; Bennett *v.* Conant, 10 Cush. 163.

of two competent witnesses, whose certificates are sworn to and recorded within thirty days in the county registry. If the witness sign the certificate by his mark, it will be sufficient.[1] This has given rise to sundry questions growing out of successive mortgages, where a later mortgagee has sought to foreclose against the mortgagor or an incumbrance subsequent to his own. Thus, if a second mortgagee enter to foreclose his mortgage, it will operate to that effect as to subsequent mortgages, although, at the time of making such entry, the first mortgagee is in actual possession of the premises.[2] Nor does an entry by a mortgagee in Massachusetts to foreclose his mortgage break the continuity of the tenant's possession, unless he actually take possession of the premises under his mortgage.[3] To foreclose by taking possession in Massachusetts does not require that the mortgagor should be ousted or expelled.[4] And after a mortgagee has made an entry upon the premises to foreclose the same, he may bring and maintain a writ of entry against the mortgagor.[5] On the other hand, neither suffering the mortgagor to retain possession of the premises after possession taken to foreclose, nor the suing out a writ of entry against the tenant, if it do not call for a conditional judgment, will have the effect of a waiver of a previous entry by the mortgagee for the purpose of foreclosing the mortgage.[6] So a husband mortgaging land in which there is a homestead right passes a reversionary interest in the land, and his mortgagee may sue to foreclose the same, and make a formal entry under the *habere facias* for that purpose, without disturbing the enjoyment by the husband or his wife and children under their homestead right.[7] So where there was a first and second mortgage, and then the first mortgagee took a third mortgage and purchased in the equity of redemption, being in possession of the premises, it was held that the second mortgagee might have an action against the first to foreclose as to the third mortgage and the

[1] Thompson *v.* Kenyon, 100 Mass. 111.

[2] Palmer *v.* Fowley, 5 Gray, 545. [3] Mitchell *v.* Shanley, 12 Gray, 206.

[4] Swift *v.* Mendell, 8 Cush. 357; Fletcher *v.* Carey, 103 Mass. 477.

[5] Beavin *v.* Gove, 102 Mass. 298; Meriam *v.* Meriam, 6 Cush. 91; Paige *v.* Robinson, 10 Cush. 99; Devens *v.* Bower, 6 Gray, 126.

[6] Fletcher *v.* Carey, 103 Mass. 479. [7] Doyle *v.* Coburn, 6 Allen, 73.

equity of redemption; and in order to give it full effect, the demandant, in such suit, might be put into temporary possession of the premises, leaving the rights of the tenant as first mortgagee unaffected by the proceedings.[1] A writ of entry in such case is like a bill in equity to foreclose, where the court may make the requisite decree to give effect to the process without affecting the defendant's rights as prior mortgagee.[2]

5 *b*. A foreclosure of a mortgage by entry and notice is so effectual in vesting the mortgagee with the absolute title to the estate, that where, after such a foreclosure, the mortgagee agreed in writing to release the "mortgaged premises" to a third party, who acted by a parol arrangement with the mortgagor, it was held not to waive or open the foreclosure.[3] And if, after a first mortgagee enters to foreclose, a second mortgagee commence a process to redeem from this prior mortgage, and, while this process is pending, the time of foreclosure under the first mortgage elapses, and the holder thereof assigns and conveys his interest to the second mortgagee, who discontinues his proceedings, he will hold the estate foreclosed in the same way as the first mortgagee would have done.[4]

6. A mortgagee, after condition broken, may not only maintain an action of ejectment to recover possession of the land, but he may at the same time sue the mortgagor in an action at law to recover the debt, and, concurrent with these, carry on a bill in equity to foreclose the mortgage.[5] Nor does it follow that he may not recover in one form of action, although there may be some technical objection to his recovering in the other. The debt may remain, and the mortgage may be enforced, although an action to recover the debt at law is barred by the statute of limitations.[6] And the same rule, as

[1] Cronin *v.* Hazletine, 3 Allen, 324; Smith *v.* Provin, 4 Allen, 516; Penniman *v.* Hollis, 13 Mass. 429; Amidown *v.* Peck, 11 Met. 469; George *v.* Baker, 3 Allen, 326, note; Kilborn *v.* Robbins, 8 Allen, 472; Doten *v.* Hair, 16 Gray, 150.

[2] Doten *v.* Hair, 16 Gray, 150.

[3] Clark *v.* Crosby, 101 Mass. 186.

[4] Thompson *v.* Kenyon, 100 Mass. 112.

[5] Burnell *v.* Martin, Doug. 417; Booth *v.* Booth, 2 Atk. 343; Coote, Mortg. 518; 2 Spence, Eq. Jur. 636; Hale *v.* Rider, 5 Cush. 231; Ely *v.* Ely, 6 Gray, 439; Payne *v.* Harrell, 40 Miss. 498; Jones *v.* Conde, 6 Johns. Ch. 77.

[6] Thayer *v.* Mann, 19 Pick. 537.

to when the right of action accrues, applies to an action upon the mortgage as upon the debt thereby secured. Thus, if it be to secure a note payable on time, which is entitled to grace, the condition of the mortgage is not broken until the days of grace have expired, although no grace is mentioned in the mortgage.[1] So the mortgagor, in a suit to foreclose the mortgage, may make any defence, except the statute of limitations, which he could make against the recovery of the debt thereby secured; as, for instance, want of consideration, or being given to defraud creditors.[2] In New Hampshire and New York, the debtor in an action of ejectment or process to enforce a mortgage may file in set-off any claims which he could do in a suit upon the debt itself, or he may plead payment before or after condition broken.[3] So in Ohio, the debtor may plead payment or satisfaction of the debt secured.[4] If a mortgage cover several parcels of estate, the mortgagee may foreclose it as to one without including the others; and if the value of the parcel foreclosed is equal to the debt secured, the same will thereby be paid, and the mortgage as to the other parcels be paid and satisfied.[5] Questions have arisen how far the character of a mortgage made to secure a negotiable note partakes of the character of the note itself, so that a payment of it to the mortgagee, after he had transferred the note and mortgage, could not be set up in defence to a suit by the assignee and indorsee thereof. This is the doctrine of Michigan and Wisconsin. But in Minnesota it was held otherwise, and that, if the mortgagor pay the debt to the mortgagee before he has actual notice of the same having been assigned, he can defend against the claim of an assignee to whom the mortgage had been assigned before such payment. And in that State, by statute, a recording of such assignment is not deemed to be constructive notice to the mortgagor of its having been made. There must be actual notice to bind

[1] Coffin *v.* Loring, 5 Allen, 153.

[2] Vinton *v.* King, 4 Allen, 562; Miller *v.* Marckle, 21 Ill. 152.

[3] Northy *v.* Northy, 45 N. H. 141; Chapman *v.* Robertson, 6 Paige, 627.

[4] Roguet *v.* Roll, 7 Ham. 80.

[5] Green *v.* Cross, 45 N. H. 582; Green *v.* Dixon, 9 Wis. 532; Hosford *v.* Nichols, 1 Paige, 220, 224; George *v.* Wood, 11 Allen, 41; Pike *v.* Goodnow, 12 Allen, 472.

him.[1] The rulings of different courts upon this point are far from uniform. In some a mortgage is regarded as an unnegotiable chose in action ; and whoever takes it, takes it subject to the same equities under which his assignor held it. In others the same negotiable qualities are given to it which the note has for the security of which it is given. The former is held by the courts of Illinois, Ohio, and New York ; while the latter is the doctrine of Massachusetts and the Court of the United States. Thus in Illinois the assignee of a mortgage cannot hold it independent of the equities under which his assignor held it, though as to the note thereby secured it would be otherwise.[2] And this is substantially the doctrine of the courts of Ohio.[3] And the courts of New York say, " Bonds and mortgages are not negotiable instruments. The assignee acquires no better title than that of his assignor." [4] Whereas the court of Massachusetts says, " We know of no principle or authority which makes the mortgage less valid than the note in the plaintiff's hands." [5] And the Court of the United States hold, that if a mortgage, made at the time of making a negotiable note to secure the same, is transferred *bona fide* for value before the maturity of the note, together with the note, the holder would not be affected by any equities arising between the mortgagor and mortgagee. As he takes the note free from the objections to which it was liable in the hands of the mortgagee, so he would take the mortgage in like manner.[6] In Maine the assignee of a mortgage, who takes it without any notice of any prior claim, is regarded a *bona fide* grantee of land, and is not affected by such claim.[7] He may have his process of foreclosure, though he has had his debtor imprisoned on an execution recovered upon

[1] Croft *v.* Bunster, 9 Wis. 503 ; Reeves *v.* Scully, Walk. Ch. 248; Dutton *v.* Ives, 5 Mich. 519 ; Cornell *v.* Hitchins, 11 Wis. 353 ; Fisher *v.* Otis, 3 Chand. 95 ; Johnson *v.* Carpenter, 7 Minn. 182, 183. See Losey *v.* Simpson, 3 Stockt. Ch. 254; Matthews *v.* Walwyn, 4 Ves. Jr. 126, which was the case of a bond and mortgage.

[2] Walker *v.* Dement, 42 Ill. 272 ; Olds *v.* Cummings, 31 Ill. 192.

[3] Bailey *v.* Smith, 14 Ohio St. 396.

[4] Andrews *v.* Gillespie, 47 N. Y. 487, 491 ; Schafer *v.* Reilly, 50 N. Y. 61, 66.

[5] Taylor *v.* Page, 6 Allen 86.

[6] Carpenter *v.* Longan, 16 Wall. 271, 273.

[7] Pierce *v.* Farmer, 47 Me. 514.

the debt.[1] Where a debt is payable in instalments, a failure to pay any one of these is such a breach as warrants proceedings to foreclose the mortgage by entry, or whatever other form is requisite.[2] And it may be assumed as generally true, that accepting security in the form of a mortgage does not prevent the creditor from pursuing any other remedy he may have for the recovery of his debt, as well as that upon his mortgage.[3] And in respect to the land itself, he may proceed in law or in equity for its recovery at one and the same time, or successively,[4] and recover his costs in either.[5] In New York, however, no judgment will be rendered or execution issued in a suit upon the note or bond, while a foreclosure suit is pending, without leave of chancery.[6] In Missouri, recovery of judgment for the amount of the debt does not preclude foreclosure of the mortgage.[7] And in [*593] *Pennsylvania, the entry of judgment for the same debt secured by mortgage does not in any way affect the lien of the mortgagee.[8] On the other hand, in Michigan and Minnesota, no proceedings can be had at law upon a mortgage while a bill to foreclose is pending.[9] In Iowa, an action on a note or mortgage for foreclosure is an equitable proceeding, if upon the note alone it is an ordinary proceeding at law.[10]

[1] Tappan *v.* Evans, 11 N. H. 311; Attorney-Gen. *v.* Winstanley, 5 Bligh, 130; Burnell *v.* Martin, Doug. 417.

[2] Estabrook *v.* Moulton, 9 Mass. 258; Hunt *v.* Harding, 11 Ind. 245.

[3] The Matter of Young, 3 Md. Ch. Dec. 461; Harrison *v.* Eldridge, 2 Halst. 392; Den *v.* Spinning, 1 Halst. 466; Longworth *v.* Flagg, 10 Ohio, 300; Knetzer *v.* Bradstreet, 1 Greene (Iowa), 382; Morrison *v.* Buckner, 1 Humph. 442; Downing *v.* Palmateer, 1 Mon. 64; Very *v.* Watkins, 18 Ark. 546; Ely *v.* Ely, 6 Gray, 439.

[4] Hughes *v.* Edwards, 9 Wheat. 487; Andrews *v.* Scotton, 2 Bland, 665; M'Call *v.* Lenox, 9 S. & R. 302; Slaughter *v.* Foust, 4 Blackf. 379; Delahay *v.* Clement, 3 Scam. 201.

[5] Very *v.* Watkins, 18 Ark. 546.

[6] Williamson *v.* Champlin, 8 Paige, Ch. 70; Suydam *v.* Bartle, 9 Paige, Ch. 294.

[7] Thornton *v.* Pigg, 24 Mo. 249.

[8] Purdon, Dig. 1857, p. 232, § 91; 1872, p. 479, § 109.

[9] Mich. Comp. Stat. 1857, pp. 1025, 1363; Comp. L. 1871, pp. 1549, 1922, §§ 5149, 6913.

[10] Code 1873, p. 429, § 2509; Christy *v.* Dyer, 14 Iowa, 443.

7. Generally, as has already been stated, the remedy of a mortgagee for any unsatisfied balance after foreclosure is at law.[1] But it is competent for the court in a foreclosure suit to appoint a receiver to take and hold the rents during the pendency of the process.[2] And, as a general proposition, the land foreclosed is taken at its value towards or in full payment of the mortgage-debt, as the case may be.[3] If of less value than the debt secured, the balance may be recovered in an action of assumpsit against the maker or indorser of the note, if that be the form of the debt.[4] The same would be the effect if the interest of the mortgagor and mortgagee came together in one person so as to merge; its effect would be like a foreclosure, and the holder of the mortgage securities can recover the difference between the value of the mortgaged estate and the debt.[5] In New York, after a bill has been filed for the satisfaction of a mortgage, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court of chancery.[6] And a judgment in a foreclosure suit contains a clause docketing the judgment against the mortgagor for any deficiency which may remain unsatisfied of the mortgage-debt, after applying the proceeds of the sale.[7] In several of the States, there is a provision whereby, upon a process of foreclosure, a decree is rendered for any deficiency that may exist after the sale of the property mortgaged, and it has been applied to the debt.[8] Thus, in Iowa, the mortgagee may have a judgment for a sale of the mortgaged premises, with an additional judgment, that if, after applying the proceeds of the sale to the debt, a balance remains unsatisfied,

[1] Stark *v.* Mercer, 3 How. (Miss.) 377.

[2] Finch *v.* Houghton, 19 Wis. 158. [3] Brown *v.* Tyler, 8 Gray, 139.

[4] Marston *v.* Marston, 45 Me. 412. See Bradley *v.* Chester Valley Railroad Co., 36 Penn. St. 150.

[5] Marston *v.* Marston, 45 Me. 412–416; Haynes *v.* Wellington, 25 Me. 458.

[6] Stat. at Large, 1863, vol. 2, p. 199.

[7] Gage *v.* Brewster, 31 N. Y. 220.

[8] These States are Arkansas, California, Indiana, Michigan, Minnesota, New York, Missouri, Texas, Iowa, — as will appear by reference to the statutes relative to foreclosure, contained in the note at the end of this chapter. Lee *v.* Kingsbury, 13 Tex. 69.

a general judgment is rendered against the debtor's other estate for the same.[1] And this is the only mode of foreclosing a mortgage in Iowa; the form of "a strict foreclosure" is superseded there by the code.[2] And the same law prevails in South Carolina;[3] while, in California, the court may give a general judgment for the amount due on the note or bond, at the same time that a decree is rendered for a foreclosure.[4]

7 *a*. The purchaser in a foreclosure sale cannot claim the intervening rent which accrues between the sale and the delivery of the foreclosure deed. His right is only consummated upon the delivery of such deed, and does not relate back.[5] If there is any surplus of the money bid for the premises upon a foreclosure sale after satisfying the mortgage, and there be a lessee of the mortgaged premises under a lease with covenants for quiet enjoyment which is defeated by such foreclosure, such lessee is entitled to so much of such surplus as would make good the difference between the value of his term and the rent he is to pay for it; or, in other words, the value of the use of the premises during his term, less the amount of the rents to be paid by him for the same.[6]

8. It is often important to ascertain who should be made parties to proceedings to foreclose a mortgage as plaintiffs and defendants. As a general propostion, all parties in interest should be made parties to such a process, since parties, though interested, if not before the court, are not bound by its decree.[7] * A decree as to them is a nullity, nor are their rights

* Note. — By statute in Florida, the assignee of a mortgage may sue alone for foreclosure. Wynn *v.* Ely, 8 Fla. 232.

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[1] Cooley *v.* Hobart, 8 Iowa, 358; Johnson *v.* Harmon, 19 Iowa, 58.

[2] Kramer *v.* Rebman, 9 Iowa, 114.

[3] Drayton *v.* Marshall, Rice, Eq. 386.

[4] Rowe *v.* Table Mountain Water Co., 10 Cal. 441; Walker *v.* Sedgwick, 8 Cal. 403; Rollins *v.* Forbes, 10 Cal. 299.

[5] Cheney *v.* Woodruff, 45 N. Y. 98.

[6] Clarkson *v.* Skidmore, 46 N. Y. 297.

[7] Goodrich *v.* Staples, 2 Cush. 258; Williamson *v.* Field, 2 Sandf. Ch. 533; McCall *v.* Yard, 1 Stockt. Ch. (N. J.) 358; Valentine *v.* Havener, 20 Mo. 133; Webb *v.* Maxan, 11 Tex. 678; Caldwell *v.* Taggart, 4 Pet. 190; Farwell *v.* Murphy, 2 Wis. 533; Hunt *v.* Acre, 28 Ala. 580; Finley *v.* United States Bank, 11 Wheat. 304. The owner of the equity always must be a party, whether his deed is recorded or not. Hall *v.* Nelson, 23 Barb. 88; Porter *v.* Clements, 3 Ark.

affected by it.[1] In Missouri, parties in interest may become parties as defendants in processes for foreclosure, upon their own application, so as to protect their own interests, though not having any legal title to the equity of redemption.[2] In Massachusetts, the only notice required of an entry made to foreclose a mortgage is the certificate and registration thereof. And this entry may be made secretly and in the night-time, as well as openly.[3] In Indiana, the wife of a purchaser of lands under a mortgage is properly made a party in a bill of foreclosure of the same.[4] Whether a wife is to be affected by a judgment for foreclosure to which she is made a party or not, depends upon whether she signed the deed. If she did, the judgment would bind her; otherwise it would not.[5] Joint tenants of a mortgage must join in a suit to foreclose it; one cannot sue alone.[6] A second mortgagee would not be barred of his right to redeem from the first by a foreclosure of the mortgagor's interest in a proceeding between the first mortgagee and mortgagor to which the second mortgagee was not a party. But his not being made a party to the suit did not affect the decree between the mortgagee and mortgagor.[7] So a decree of sale for purposes of foreclosure of a mortgage would be void as to a purchaser of any part of the mortgaged premises who should not have been made a party to such process.[8] If a mortgagor becomes bankrupt, his equity of redemption, by the decree declaring him such, passes to his assignee, and a foreclosure thereof made without making such assignee a party would be void. The assignee might still redeem the estate.[9] So if such junior mortgagee see fit to redeem from the senior, who has foreclosed as to the mortgagor, he may do so, and would not be liable for the costs of

364; White *v.* Watts 18 Iowa, 76; Anson *v.* Anson, 20 Iowa, 55; Chase *v.* Abbott, 20 Iowa, 158; Carpentier *v.* Williamson, 25 Cal. 161; McArthur *v.* Franklin, 15 Ohio St. 509; 2 Spence, Eq. Jur. 703; Montgomery *v.* Tutt, 11 Cal. 315.

[1] Colter *v.* Jones, 52 Ill. 84.

[2] Bates *v.* Miller, 48 Mo. 409.

[3] Ellis *v.* Drake, 8 Allen, 161.

[4] Watt *v.* Alvord, 25 Ind. 534.

[5] Mooney *v.* Maas, 22 Iowa, 380.

[6] Webster *v.* Vandeventer, 6 Gray, 428.

[7] Goodman *v.* White, 26 Conn. 317, 320; Vanderkemp *v.* Shelton, 11 Paige, 28; Grattan *v.* Wiggins, 23 Cal. 32; Newcomb *v.* Dewey, 27 Iowa, 388.

[8] Ohling *v.* Luitjens, 32 Ill. 23.

[9] Winslow *v.* Clark, 47 N. Y. 261.

the former process.[1] Whoever is interested in the estate at the time of commencing proceedings to foreclose it, — second incumbrancers, for instance, — must be made parties, or they will not be bound by these proceedings. Nor is it material whether this interest was acquired before or after the making of the mortgage-deed.[2] But if a person becomes interested in the estate by purchase during the pendency of proceedings, *pendente lite*, he need not be made party to the suit.[3] Every person purchasing an interest in an estate during the pendency of a suit affecting the title to the same is bound by the judgment in such suit, without being made a party to the same. Such a purchase *pendente lite* is in law a notice to the purchaser as much as if formally made a party to it.[4] Judgments and decrees bind equally parties and privies; and purchasers, *pendente lite*, stand in the latter category.[5]

[*594] * Where a mortgage had been assigned to several, and one of them died, his interest in the mortgage-debt was held to survive to the others, and his personal representatives need not be made parties to a bill of foreclosure. But where the holder of a mortgage by an equitable title only wished to foreclose the same, it was held that he should make him a party in whom was the legal title.[6] In applying this rule, it has been held that all incumbrancers upon the same estate, whether prior or subsequent, should be made defendants to a bill for foreclosure.[7] Accordingly, in those States in which rights of homestead exist in favor of wives, the wife of the owner of the equity of redemption will not be bound

[1] Gage *v.* Brewster, 31 N. Y. 218; Grattan *v.* Wiggins, 23 Cal. 32.

[2] Haines *v.* Beach, 3 Johns. Ch. 459; Fisher, Mortg. 187; Heyman *v.* Lowell, 23 Cal. 106; Skinner *v.* Buck, 29 Cal. 257.

[3] Hall *v.* Lyon, 27 Mo. 570.

[4] Story, Eq. § 405–407; Hayes *v.* Shattuck, 21 Cal. 51; Montgomery *v* Middlemiss, 21 Cal. 106. See as to *Lis pendens* and its effect, Fisher on Mortg. 221, 335–339; Jackson *v.* Warren, 32 Ill. 340; Haven *v.* Adams, 8 Allen, 367.

[5] Dickson *v.* Todd, 43 Ill. 507; Crooker *v.* Crooker, 57 Me. 396; Snowman *v.* Harford, 57 Me. 400.

[6] Martin *v.* McReynolds, 6 Mich. 70; Cote *v.* Dequindre, Walker, Ch. 64.

[7] Swift *v.* Edson, 5 Conn. 531; Weed *v.* Beebe, 21 Vt. 495; Ducker *v.* Belt, 3 Md. Ch. Dec. 13; Champlin *v.* Foster, 7 B. Mon. 104; Wood *v.* Oakley, 11 Paige, Ch. 400; Downer *v.* Clement, 11 N. H. 40; Bank of United States *v.* Carroll, 4 B. Mon. 50; Clark *v.* Prentice, 3 Dana, 467; Kenton *v.* Spencer, 6 Ind. 321; Brown *v.* Nevitt, 27 Miss. 801.

by a decree of foreclosure against her husband, unless she is made a party to it.[1] It has accordingly been held, that, if a second mortgagee seeks to foreclose under his mortgage, he must make the prior mortgagee a party to his bill.[2] In New York, in such a case, the second mortgagee may make the prior one a party.[3] So in New Hampshire ;[4] and in Tennessee, while he need not make him a party, he may make subsequent incumbrancers parties, but is not required to do so. And the same is the rule in Indiana.[5] The necessity of making prior as well as subsequent mortgagees parties to his bill, where a second mortgagee seeks to foreclose, may be obvious, where the foreclosure is by a sale of the estate ; for, as was remarked by the court in Roll *v.* Smalley, cited above, " nothing more than the equity of redemption can be decreed to be sold, unless the first mortgagee * comes in with his mortgage, and thereby consents that a decree shall be made for the sale of the property to pay his mortgage also." But such does not seem to be necessary in case of what is called a strict foreclosure, since it does not bind the prior mortgagee, but only cuts off the mortgagor and subsequent mortgagees, who stand, as to the second mortgagee, as assignees of the mortgagor's equity of redemption.[6] So where a mortgage may be foreclosed by entry upon the land, and holding possession, a subsequent mortgage is foreclosed thereby, whether the entry is made and possession gained *in pais* or under judgment of court, although no formal notice was given to such subsequent mortgagee.[7] How far judgment creditors, in those States where judgments create liens upon the debtor's land, should be made parties to a bill by a first

[*595]

[1] Revalk *v.* Kraemer, 8 Cal. 66; Tadlock *v.* Eccles, 20 Tex. 782; Larson *v.* Reynolds, 13 Iowa, 586; Moss *v.* Warner, 10 Cal. 297.

[2] Wylie *v.* McMakin, 2 Md. Ch. Dec. 413; Shiveley *v.* Jones, 6 B. Mon. 274; Roll *v.* Smalley, 2 Halst. Ch. 464; Clark *v.* Prentice, 3 Dana, 468; Person *v.* Merrick, 5 Wis. 231.

[3] Holcomb *v.* Holcomb, 2 Barb. 20; Vanderkemp *v.* Shelton, 11 Paige, Ch 28.

[4] Howard *v.* Handy, 35 N. H. 315.

[5] Mims *v.* Mims, 1 Humph. 425; Rowan *v.* Mercer, 10 Humph. 359; Mack *v.* Grover, 12 Ind. 254.

[6] 1 Daniell, Ch. Pract. 262; Coote, Mortg. 523; Smith *v.* Chapman, 4 Cow. 344.

[7] Downer *v.* Clement, 11 N. H. 40; Gilman *v.* Hidden, 5 N. H. 30.

mortgagee to foreclose against subsequent incumbrancers, is differently held by different courts. It has been held in South Carolina, Tennessee, and Wisconsin, that they need not be; and so in Vermont. But in a case in England (1844), this was held to be necessary.[1] And also in New York, where a foreclosure is of no effect against a judgment creditor who is not a party to the foreclosure suit.[2] A mortgagor need not be made party to a bill for foreclosure, where he has parted with his equity of redemption,[3] unless he shall have done so with a general warranty of title.[4] Where, therefore, a mortgagor had conveyed his estate to a third person, who had conveyed the same to the mortgagor's wife, it was held that the writ of entry by the mortgagee for the purpose of foreclosing the mortgage should be brought against the wife of the mortgagor, and not against him.[5] So if one purchase of a mortgagor, and then convey to a third party, though it be with warranty, he need not be made a party to a suit for foreclosure.[6] Nor can the title of one who claims adversely to the mortgagor, by a title prior to the mortgage, be affected by being made a party to such a bill against the mortgagor. He should not be made a party at all.[7] The effect of a foreclosure upon parties is different in different States. In Georgia, such a judgment binds not only the mortgagor, but his vendee, though not a party.[8] In California, a [*596] *person claiming an interest subsequent to the mortgage is a proper party to the suit for foreclosure, with limited liability as to costs; while in Missouri any person claim-

[1] Felder *v.* Murphy, 2 Rich. Eq. 58; Mims *v.* Mims, 1 Humph. 425; Person *v.* Merrick, 5 Wis. 231; Downer *v.* Fox, 20 Vt. 388; Adams *v.* Paynter, 1 Coll. 530.

[2] Brainard *v.* Cooper, 10 N. Y. 356; Alexander *v.* Greenwood, 24 Cal. 511; Gage *v.* Brewster, 31 N. Y. 225.

[3] Shaw *v.* Hoadley, 8 Blackf. 165; Lockwood *v.* Benedict, 3 Edw. Ch. 472; Heyer *v.* Pruyn, 7 Paige, Ch. 465. In Massachusetts he may, but need not, be made a party. Gen. Stat. c. 140, § 8. See also Maine, Rev. Stat. 1857, c. 90, § 10; 1871, c. 90, § 12; Delaplaine *v.* Lewis, 19 Wis. 476.

[4] Bigelow *v.* Bush, 6 Paige, Ch. 343; Buchanan *v.* Monroe, 22 Tex. 557.

[5] Campbell *v.* Bemis, 16 Gray, 486.

[6] Soule *v.* Albee, 31 Vt. 142.

[7] Holcomb *v.* Holcomb, 2 Barb. 20; Corning *v.* Smith, 2 Seld. 82; Brundage *v.* Missionary Society, 60 Barb. 205.

[8] Knowles *v.* Lawton, 18 Ga. 476.

ing an interest in the mortgaged property may on motion be made defendant. In New York and Illinois, the owner of the equity of redemption is a necessary party.[1] In New York, the wife of the grantee of a mortgagor must be made a party, while she need not be in Missouri; nor is the widow of the mortgagor a necessary party defendant in Tennessee.[2] But in Massachusetts, a mortgage may be foreclosed by a suit, judgment, and possession, so as to bar the wife of the mortgagor who has joined in the deed, although not a party to the suit. But such is not the case in Ohio. And the difference may arise, perhaps, from the length of time after a mortgagee gains possession, during which he must hold it before it works a foreclosure, which operates as a notice to the wife of the pendency of the process.[3] If the mortgagor be dead, his heir or devisee is to be the party defendant in a process for foreclosure, and not his personal representatives; except in California, where the plaintiff asks for a judgment for a deficiency as well as a decree of sale; in Missouri, where they are required to be parties by statute; in North Carolina and Maryland, where they may be made parties; and in Georgia, where they are deemed to be properly made defendants in such a suit.[4] In Illinois, the proceedings may be against the heir, or the executors or administrators of the

[1] Loring *v.* Bradley, 10 Cal. 265; Missouri, Rev. Stat. 1372, c. 99, § 7; Hall *v.* Nelson, 23 Barb. 88; Bradley *v.* Snyder, 14 Ill. 263; Brundred *v.* Walker, 1 Beasley (N. J.), 140; Haffly *v.* Maier, 13 Cal. 13; Veach *v.* Schaup, 3 Iowa, 194; Hodson *v.* Treat, 7 Wis. 263.

[2] Mills *v.* Van Voorhies, 23 Barb. 125; Thornton *v.* Pigg, 24 Mo. 248; Mims *v.* Mims, 1 Humph. 425; Bell *v.* Mayor, &c., 10 Paige, 49; Wheeler *v.* Morris, 2 Bosw. 524; Mills *v.* Van Voorhies, 20 N. Y. 412; Denton *v.* Nanny, 8 Barb. 618. See Smith *v.* Gardner, 42 Barb. 365, as to cases of mortgages made before marriage.

[3] Pitts *v.* Aldrich, 11 Allen, 40; Farwell *v.* Cotting, 8 Allen, 212; Savage *v.* Hall, 12 Gray, 365; McArthur *v.* Franklin, 15 Ohio St. 510; s. c. 16 Ohio St. 193; Davis *v.* Wetherell, 13 Allen, 62; Newhall *v.* Savings Bank, 101 Mass. 431.

[4] Slaughter *v.* Foust, 4 Blackf. 379; Shirkey *v.* Hanna, 3 Blackf. 403; Graham *v.* Carter, 2 Hen. & M. 6; McIver *v.* Cherry, 8 Humph. 713; Sheldon *v.* Bird, 2 Root, 509; Worthington *v.* Lee, 2 Bland, 678; Harvey *v.* Thornton, 14 Ill. 217; Beloe *v.* Rogers, 9 Cal. 123; Missouri Rev. Stat. 1855, c. 113, § 4; 1872, c. 99, § 4; Miles *v.* Smith, 22 Mo. 502; Averett *v.* Ward, Busbee, Eq. 192; Magruder *v.* Offutt, Dudley (Ga.), 227.

mortgagor, at the plaintiff's election.[1] In Wisconsin, where there are several notes secured by a mortgage, and one of them has been assigned, the assignee may be joined as a defendant in a bill to foreclose; while it is held otherwise in Missouri, the proceeding in the latter State being a proceeding at law, and not governed by the rules of equity.[2] And by the law of Wisconsin, where there were three notes secured by a mortgage, held by different individuals, the first of which had been paid, and the holder of the third wished to foreclose the mortgage, it was held that he must make the holder of the second note a party to such proceeding.[3] But a receiver of a mortgagee, appointed by a court of a State of which he is a citizen, will not be admitted to prosecute a suit to foreclose a mortgage in another State, unless the mortgagee shall have made a formal assignment of the mortgage to him; and in that case he acts as assignee, and not as a receiver.[4] To a bill to foreclose, sued by a trustee, the *cestuis que trust* should all be joined as parties.[5] And accordingly, where, as in Maine, the holder of the legal estate of a mortgagee has parted with the debt, he becomes thereby trustee for the holder of the debt, and both should join in a process for foreclosure;[6] and if [*597] there are two or more joint mortgagees, * they must all join in a bill for foreclosure.[7] And where one of several persons who hold notes secured by a joint mortgage wishes to sue upon the mortgage, he may use the names of the others in a process at law, upon giving them indemnity for costs. In such a case they must all be joined.[8] But if the mortgage

[1] Rockwell *v.* Jones, 21 Ill. 279.

[2] Armstrong *v.* Pratt, 2 Wis. 299; Thayer *v.* Campbell, 9 Mo. 280.

[3] Pettibone *v.* Edwards, 15 Wis. 95.

[4] Graydon *v.* Church, 7 Mich. 51; Booth *v.* Clark, 17 How. 332, 339.

[5] Davis *v.* Hemingway, 29 Vt. 438; Wood *v.* Williams, 4 Madd. 186; Lowe *v.* Morgan, 1 Bro. Ch. 368; Story, Eq. Pl. § 201. See Somes *v.* Skinner, 16 Mass. 348; Daniell, Ch. Pract. 267; Martin *v.* McReynolds, 6 Mich. 70.

[6] Beals *v.* Cobb, 51 Me. 349.

[7] Hopkins *v.* Ward, 12 B. Mon. 185; Shirkey *v.* Hanna, 3 Blackf. 403; Stucker *v.* Stucker, 3 J. J. Marsh. 301; Hartwell *v.* Blocker, 6 Ala. 581; Saunders *v.* Frost, 5 Pick. 259; Johnson *v.* Brown, 11 Fost. (N. H.) 405; Webster *v.* Vandeventer, 6 Gray, 428; Powell, Mortg. 964 a, n.; 1 Daniell, Ch. Pract. 260.

[8] Johnson *v.* Brown, 11 Fost. (N. H.) 405. Otherwise in Missouri, where each may sue alone. Thayer *v.* Campbell, 9 Mo. 280.

be to several to secure notes owned separately and distinctly, and one of these be paid, the payee cannot sue on the mortgage in his own name, though he is, in fact, the sole survivor of the several persons named in the mortgage, as the mortgage in respect to him will have become extinct.[1]

8 *a*. It may be added as a kind of corollary to what has been stated above, the rights of every one who is properly made a party to the process are concluded by a judgment of foreclosure.[2] But this would not extend to parties who were not parties or privies to the mortgage, as in the case before cited of a wife made party to a process of foreclosure who did not join in the mortgage.[3] And if, upon a bill to redeem, the plaintiff fail to comply with the terms which the court has prescribed upon which it may be done, it will be an effectual bar to a further process for redemption.[4]

9. The law of the States is general, though not uniform, that, where a mortgagee is dead, his personal representatives, and not his heirs, are the persons to maintain a process of foreclosure.[5] If there be a joint mortgage to two to secure a joint debt, and one of them die, the survivor sues alone to foreclose it.[6] But where a bond and mortgage were made to husband, conditioned to support him and his wife, and the husband died, it was held that it was to be enforced after that in the name of his administrator. She would be the one to demand the support, and she may do this though she were to marry again. But she could not enter for condition broken, nor could she demand any thing towards the support of her second husband.[7] Upon the foreclosure of a mortgage by an executor, the land belongs to the parties who would have been entitled to the debt if paid and not used in administra-

[1] Burnett *v.* Pratt, 22 Pick. 556; Mitchell *v.* Burnham, 44 Me. 305.

[2] Grattan *v.* Wiggins, 23 Cal. 32; Shores *v.* Scott River Co., 21 Cal. 135.

[3] Mooney *v.* Maas, 22 Iowa, 380.

[4] 4 Kent, 186.

[5] Kinna *v.* Smith, 2 Green, Ch. 14; Missouri Rev. Stat. 1855, c. 113, § 4; 1872, c. 99, § 4; Riley *v.* McCord, 24 Mo. 265; Smith *v.* Dyer, 16 Mass. 18; Dewey *v.* Van Dusen, 4 Pick. 19; Maine Rev. Stat. 1857, c. 90, § 10; 1871, c. 90, § 10; Mass. Gen. Stat. c. 96, § 9. Though once held necessary to join the heir in Maryland, it seems to be otherwise by statute now. Worthington *v.* Lee, 2 Bland, 678; Maryland Code, 1860, p. 94, art. 16, § 111; Perkins *v.* Woods, 27 Mo. 547.

[6] Blake *v.* Sanborn, 8 Gray, 184.

[7] Holmes *v.* Fisher, 13 N. H. 1.

tion, subject to the right of the executor to dispose of it in the discharge of his office.[1] If a mortgagee has assigned his entire interest in the mortgage, his assignee may sue for foreclosure in his own name without joining the original mortgagee, though it is otherwise if the assignment be a limited or conditional one.[2]

[*598] *10. It is laid down as a doctrine of the courts, that a mortgagee's title is not open to investigation in a process by him for foreclosure; the only effect of a decree in such a proceeding being to bar the mortgagor's equity of redemption, leaving the mortgagee to pursue his legal remedies to establish his title to the estate.[3] But this would not seem to be true where the remedy of the mortgagee for foreclosing his mortgage is by a suit at common law for possession, where the issue between the parties may involve the seisin and freehold in the mortgagee. In an action to recover possession, the mortgagor is estopped by his deed to deny the title of mortgagee to the premises at the time of making the mortgage.[4] And it is true that a foreclosure suit is not a proper one in which to try the rights of litigant parties who claim title to the mortgaged premises hostile to that of the mortgagor, even though all are parties to the suit, and although all claimants whose titles are derived from the mortgagor subsequently to the making of the mortgage ought to be made parties to such suit.[5] If a party summoned claims nothing in the estate subsequent and subject to the mortgage, he ought to disclaim, and have the suit dismissed as to him. But if

[1] Fifield *v.* Sperry, 20 N. H. 338; Mass. Gen. Stat. c. 96, §§ 10, 13, 14.

[2] Daniell, Ch. Pract. 307; Whitney *v.* M'Kinney, 7 Johns. Ch. 144; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; Lamson *v.* Falls, 6 Ind. 309; McGuffey *v.* Finley, 20 Ohio, 474; Ward *v.* Sharp, 15 Vt. 115; Miller *v.* Henderson, 2 Stockt. (N. J.) Ch. 320; Lewis *v.* Nangle, 2 Ves. Sr. 431; Story, Eq. Pl. § 199.

[3] Coote, Mortg. 517; Powell, Mortg. 965; Anonymous, 2 Cas. in Ch. 244; Broome *v.* Beers, 6 Conn. 198; Palmer *v.* Mead, 7 Conn. 149. In Connecticut, the assignee of the debt may have a foreclosure, though the legal estate has not been conveyed to him. Austin *v.* Burbank, 2 Day, 474; Holcomb *v.* Holcomb, 2 Barb. 20; Jones *v.* St. John, 4 Sandf. Ch. 208; Corning *v.* Smith, 2 Seld. 82.

[4] Concord, &c. Ins. Co. *v.* Woodbury, 45 Me. 447.

[5] Lewis *v.* Smith, 5 Seld. 514; Corning *v.* Smith, 2 Seld. 82; Eagle F. Ins. Co. *v.* Lent, 6 Paige, 635; Pelton *v.* Farmin, 18 Wis. 227; Palmer *v.* Yager, 20 Wis. 103.

he sets up a title paramount to the mortgage, it would be no answer to the allegations in the bill or process of foreclosure.[1] Nor would any judgment in such foreclosure suit affect his paramount title acquired before the mortgage in suit was made.[2] And if a subsequent mortgagee is summoned as a party in such suit, he can make no objection to the proceeding, unless he can show that he would sustain some loss or injury by a judgment therein.[3]

11. The effect of a decree of foreclosure in equity upon an infant holder of an equity of redemption is said to be, that he will be bound by it, unless within six months after arriving at age he shall show some error in the foreclosure;[4] and if the foreclosure is by a sale of the premises, the infant cannot disturb the title acquired under such a decree;[5] and probably one reason why a judgment in such cases would be binding upon the infant is the general jurisdiction which chancery has over infants, and the precautions adopted in that court to protect their interests. Whereas, where the remedy for foreclosure is by a suit at common law, the same rule would probably apply to judgments for foreclosure as to other judgments, in requiring the precaution of having a guardian *ad litem* appointed, in order to their being valid.

12. In respect to the effect of such a decree upon the rights of a *feme covert*, it seems that she would be bound by it if the bill is brought against her and her husband, even though he neglect to defend.[6] But this depends, as above stated, upon whether she was a party to the mortgage-deed by having signed the same.[7] And where, as in Massachusetts, a mortgage is foreclosed by possession taken, and continued a prescribed *length of time, a wife would not be [*599] bound by such entry and possession by the mortgagee without notice to her, though known and assented to by the husband.[8]* But it seems now that the wife's interest may

* Note. — A mortgage by an infant *feme covert* for the debt of her husband is absolutely void, not merely voidable. Chandler *v.* McKinney, 6 Mich. 217;

[1] Pelton *v.* Farmin, *sup.*; Corning *v.* Smith, *sup.*
[2] Strobe *v.* Downer, 13 Wis. 10; Lewis *v.* Smith, *sup.*
[3] Mann *v.* Thayer, 18 Wis. 480.
[4] 2 Cruise, Dig. 199.
[5] Mills *v.* Dennis, 3 Johns. Ch. 367.
[6] Mallack *v.* Galton, 3 P. Wms. 352.
[7] Mooney *v.* Maas, 22 Iowa, 380.
[8] Hadley *v.* Houghton, 7 Pick. 29; Swan *v.* Wiswall, 15 Pick. 126.

be foreclosed under the statute process for that purpose, although she is not made a party to the same.[1]

13. Mortgages, as has been stated, are often given by way of indemnity to sureties; and in such case it is held, that if the principal fails to pay the debt at maturity, and thereby subjects the surety to liability to a suit, it will be such a breach that the mortgagee may proceed to take possession for condition broken.[2] Though it would seem that he cannot have a decree for foreclosure until he has paid the debt of the principal.[3]

14. In Massachusetts, the taking and holding possession for condition broken three years will work a foreclosure of the mortgage,[4] and this although the taking of possession be secretly done, and the mortgagor be left in possession, provided a certificate of its having been taking be duly recorded.[5] And in computing the three years, the day on which the entry is made is to be excluded.[6] But a mortgagee, after having taken possession, may voluntarily surrender his possession to the mortgagor, and thereby waive the effect of the same as a foreclosure.[7] So where the mortgagee, after having taken possession, and before the expiration of the three years, executed a bond to the mortgagor conditioned to release the mortgage if paid at a time beyond the expiration of the three years, it was held to operate as an extension of the time of redemption to the time fixed in the bond.[8] But the mere suffering a second mortgagee to retain possession of a portion of the premises, after the first mortgagee shall have taken possession to foreclose and recorded such possession, will not

Adams *v.* Ross, 1 Vroom, 513; Cason *v.* Hubbard, 38 Miss. 46; Markham *v.* Merrett, 7 How. (Miss.) 437.

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[1] Davis *v.* Wetherell, 13 Allen, 62; Newhall *v.* Savings Bank, 101 Mass. 430.

[2] Shaw *v.* Loud, 12 Mass. 449; Gilman *v.* Moody, 43 N. H. 243.

[3] Shepard *v.* Shepard, 6 Conn. 37; Francis *v.* Porter, 7 Ind. 213; Ellis *v.* Martin, Id. 652; McLean *v.* Ragsdale, 31 Miss. 701. See *ante*, p. *560; Pope *v.* Hays, 19 Tex. 378; Rockfeller *v.* Donnelly, 8 Cow. 628; Chace *v.* Hinman, 8 Wend. 452; Hall *v.* Nash, 10 Mich. 303; Butler *v.* Ladue, 12 Mich. 180.

[4] Erskine *v.* Townsend, 2 Mass. 493; Newall *v.* Wright, 3 Mass. 138; Pomeroy *v.* Windship, 12 Mass. 514.

[5] Ellis *v.* Drake, 8 Allen, 161.

[6] Fuller *v.* Russell, 6 Gray, 128.

[7] Botham *v.* M'Intier, 19 Pick. 346; White *v.* Rittenmeyer, 30 Iowa, 273.

[8] Joslin *v.* Wyman, 9 Gray, 63. See Tenney *v.* Blanchard, 8 Gray, 579.

affect the foreclosure by the lapse of the three years.[1] Nor where there were two mortgagors who suffered the mortgagee to foreclose by the lapse of three years would it open the redemption, if the mortgagee were to convey the entire estate to one of the mortgagors at a price corresponding with the debt originally secured by the mortgage.[2]

15. The effect of a foreclosure is to convert the mortgagee's interest into real estate, which goes to his heirs by descent.[3] Though by statute in Massachusetts, if the foreclosure is by the executor or administrator of the mortgagee, it is distributed to the same persons as would take the distributive shares of the personal estate.

16. If a mortgage is foreclosed, the debt is, to the extent of the value of the property taken by the mortgagee, paid. But a decree for strict foreclosure does not operate a satisfaction of the debt until after the time fixed by the decree for redemption has expired.[4] And where the mortgage included two parcels, one of which the mortgagor conveyed to A, and the other to B, and the mortgage was foreclosed as to A's parcel, it was held that B might redeem his by paying the balance due on the mortgage-debt after deducting the value of A's parcel from the amount of the original debt.[5]

[1] Hobbs *v.* Fuller, 9 Gray, 98.

[2] Crittenden *v.* Rogers, 8 Gray, 452.

[3] Swift *v.* Edson, 5 Conn. 531; Mass. Gen. Stat. c. 96, § 14. For the effect of foreclosing mortgages upon the rights of tenant to emblements, see *ante*, p. *106.

[4] Peck's Appeal, 31 Conn. 215; Edgerton *v.* Young, 43 Ill. 470.

[5] George *v.* Wood, 11 Allen, 41; Hedge *v.* Holmes, 10 Pick. 380; *ante*, pl. 6.

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* NOTE. — Subjoined the reader will find a compendium of the laws [*600] of the several States, with some of the leading cases bearing upon the same, respecting the foreclosure of mortgages, which may serve, among other things, to explain some of the apparent discrepancies in the decisions of the different States. The methods of enforcing a mortgage and obtaining a foreclosure in the United States are quite various; though the more prevalent mode is by a bill in chancery under the general and inherent jurisdiction of courts of equity, subject to various statutory regulations in the details of proceedings, or by a suit in a common-law court in the nature of a proceeding in equity. Under this system, the general course is for the court to pass an interlocutory decree for the payment of the money into court by a day limited,

either by the court in its discretion, or, as in some cases, by statute; on default of which the land is decreed to be sold by the sheriff or a master in chancery, and the money applied to the payment of the debt and the costs, and the balance, if any, is delivered to the debtor.

In *Alabama*, the equity system of foreclosure is subject to few statutory regulations. After a sale of the estate on foreclosure, the mortgagor, his executor, administrator, or judgment creditor, may redeem the land of the purchaser or his vendee within two years thereafter, on payment of the purchase-money with ten per cent interest, together with the value of all permanent improvements made by the occupant. Code 1867, §§ 2509–2521. The right of redeeming after a sale can be enforced only in equity. Smith *v.* Anders, 21 Ala. 782. On a bill to foreclose, the court can only decree a sale or foreclosure; and the balance of the debt must be pursued at law, though it cannot be recovered unless there be a distinct covenant in the mortgage to pay the debt, or a separate bond or note, or other evidence of the debt. Hunt *v.* Lewin, 4 Stew. & P. 138. That a mortgage contains a power of sale does not deprive a court of chancery of jurisdiction to foreclose. Carradine *v.* O'Connor, 21 Ala. 573.

In *Arkansas*, the mortgagee files a petition for foreclosure in the circuit court against the mortgagor and the actual occupants of the estate. Upon the trial of the petition, if it be found that the petitioner is entitled to recover, the court render judgment for the debt, interest, and costs, and order the property to be sold. Before sale, the property may be redeemed. If the property proves insufficient, an execution may be issued against the defendant as an ordinary judgment. Dig. of Stat. 1858, c. 117, §§ 4–17. These proceedings are essentially those of a court of chancery, and must be governed by the principles and rules of equity. McLain *v.* Smith, 4 Ark. 244; Price *v.* State Bank, 14 Ark. 50. A decree must fix some certain time for payment, in default whereof the sale is to be made. Fowler *v.* Byers, 16 Ark. 196.

In *California*, on a decree of sale upon foreclosure, if the debt be not all due, only sufficient property is sold to pay the amount due; and afterwards, as often as more becomes due, the court may, on motion, order more to be sold. But if the [*601] property cannot be conveniently divided, the whole may be ordered * to be sold in the first instance, and the entire debt paid. If the property sold is not sufficient to satisfy the debt, the court may order an execution for the balance. Dig. of Laws, 1858, arts. 981–983, p. 200; Code, &c., 1872, p. 196, §§ 727, 728. There is the same statutory right of redemption as in cases of sale under ordinary judgments at law. McMillan *v.* Richards, 9 Cal. 365; Koch *v.* Briggs, 14 Cal. 263. See Dig. 1858, arts. 963–969; Code, &c., 1872, §§ 700–706; Amend. 1874, p. 323. And the sale passes the entire estate of the mortgagor to the purchaser, who may take possession under his deed at once; and if resisted, the court will, by writ, put him in possession. Montgomery *v.* Middlemiss, 21 Cal. 107; *ante*, pl. 3.

In *Oregon*, mortgages are foreclosed by suit in equity. The property is adjudged to be sold to satisfy the debt. In addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor, the court also decree a recovery of the amount of such debt against the mortgagor. If the mortgaged property is not sufficient to satisfy the decree, the amount remaining unsatisfied may be enforced by execution as in ordinary cases. A decree of foreclosure has the effect to bar the equity of redemption, and property sold on execution

issued upon a decree may be redeemed as in ordinary cases of sale on execution. If the debt is payable by instalments not then due, the court may decree a sale of the property for the satisfaction of the whole debt, or so much thereof as may be necessary to satisfy the instalment; and in the latter case the decree may be enforced by an order of sale, whenever a default shall be made. Suit for foreclosure cannot be maintained during pendency of action for the debt. Code 1862, pp. 106–109; Gen. L. 1872, pp. 196, 197.

In *Florida*, a petition to foreclose is filed in the circuit court four months before the sitting of the court. Judgment is rendered for the debt, unless good cause be shown to the contrary, and an absolute foreclosure decreed at the first term. If the defendant is absent, an advertisement of the intention of the party to institute a suit is required. Upon judgment, execution issues as in other cases. Thomp. Dig. 1847, pp. 376–378. The proceeding under this statute is an anomalous one, partaking partly of chancery and partly of common-law principles. Daniels *v.* Henderson, 5 Fla. 452.

In *Georgia*, upon application for foreclosure, the court grant a rule that the debt be paid within three months; which rule shall be published, or served upon the mortgagor. Unless so paid, the court order the property to be sold as upon execution. Cobb, New Dig. 1851, p. 570; Code 1873, §§ 3962, 3968.

In *Indiana*, a suit for foreclosure is instituted in the court of common pleas, or circuit court of the county where the land lies. In rendering judgment of foreclosure, the court shall order a sale of the premises; and when there is contained in the mortgage, or any separate instrument, an express written agreement for the payment of the sum of money secured, the court shall direct in the order of sale that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any property of the mortgage debtor. The plaintiff shall not prosecute any other action for the debt or matter secured by the mortgage while he is foreclosing. When there are instalments not due, the complaint will be dismissed on payment, before final judgment, of the part which is due. If such payment be made after final judgment, proceedings thereon will be stayed. In the final judgment, the court direct at what time and upon what default any subsequent execution shall issue. If the court ascertain that the property can be sold in parcels, they direct so much only to be sold as will be sufficient to pay the amount due, and the judgment shall remain and be enforced upon any subsequent default. If the premises cannot be sold in parcels, the court order the whole to be sold, and the proceeds to be applied, first to the payment of the part due, and then to the residue secured by the mortgage and not due. Rev. Stat. 1852, vol. 2, pp. 176, 177; 1862, vol. 2, §§ 631–640. Nor is it competent for the legislature, by a law made after the execution of a mortgage, to shorten the term of notice of a sale required by law at the date of such mortgage. Hopkins *v.* Jones, 22 Ind. 315.

The methods of foreclosure in *Michigan* and *New York* are quite similar. In *Michigan*, the circuit court of chancery may order a sale of the mortgaged premises after one year from the filing of the bill of foreclosure. In the States above named, if there is a balance of the mortgage-debt unsatisfied after a sale of the premises, in case such balance is recoverable at law, the court may issue the necessary executions against other property of the mortgagor. No proceedings are to be had *at law while the bill is pending; and the bill [*602] is to state whether any proceedings have been had at law for the recovery of the debt; and if judgment has been obtained at law, no proceedings are

to be had unless the execution is returned unsatisfied. The sale is by a master, who executes a deed, and applies the proceeds to the discharge of the debt. In these States, also, mortgages containing a power of sale may be foreclosed by advertisement, after default, provided no suit or proceeding has been instituted at law, or that execution in such suit has been returned unsatisfied, and provided the power of sale or the mortgage containing it has been duly recorded. In *New York*, such sale shall be equivalent to a foreclosure in equity, so far as to be an entire bar to the mortgagor's equity of redemption. In *Michigan*, the sale in such case is made by the sheriff, who executes a deed to be operative if the premises are not redeemed within one year by the payment of the purchase-money with interest at the rate borne by the mortgage-note, not exceeding ten per cent. In *Minnesota*, actions for foreclosure of mortgages are governed by the same rules as civil actions, with certain exceptions, and judgment is entered fixing the amount due, and directing the sheriff to sell the mortgaged premises; and the court may issue the necessary execution against the other property of the mortgagor; and proceedings may be stayed or dismissed upon the defendant's bringing into court the principal and interest due, with costs. But if the foreclosure is by advertisement, the mortgagor has one year within which to redeem the estate. The ordinary mode of foreclosure is by a sale of the premises, or so much as is necessary to satisfy the debt, which is done by the sheriff under a decree of the court. Baldwin *v.* Allison, 4 Minn. 25; Lawler *v.* Claflin, 22 How. 23, 27; Stat. at Large, 1873, vol. 2, pp. 900, 907.

In the case of foreclosure by advertisement in *Michigan* and *New York*, the mortgagor or his creditor may redeem within three years upon paying the purchase-money with seven per cent interest. But the mortgagor may effectually waive the right of redemption, excepting one year, either in the mortgage, or by a separate instrument recorded. On condition of payment of interest as above, the mortgagor is entitled to retain possession of the premises sold. But it is competent for the court, instead of this, to decree a strict foreclosure in favor of the mortgagee; and such seems to be the law in *Wisconsin*. Heyward *v.* Judd, 4 Minn. 492; Pace *v.* Chadderdon, 4 Minn. 502; Drew *v.* Smith, 7 Minn. 307; Bean *v.* Whitcomb, 13 Wis. 431; Willard, R. E. 141. See *New York*, Rev. Stat. 5th ed. vol. 3, pp. 272–274, 859–861; Stat. at Large, 1863, vol. 2, pp. 199–201, 564–567. *Michigan*, Comp. Laws, 1857, §§ 3563–3579, 5177–5194; Laws 1861, p. 54; Laws 1863, pp. 54 and 159; 1871, c. 176 and c. 218.

In *Wisconsin*, mortgages containing a power of sale may be foreclosed upon default in a manner similar to that above mentioned. The mortgagor may redeem within one year, during which time he may retain possession. In an action in the court of chancery for the foreclosure of a mortgage, the defendant shall have six months to answer the bill or complaint. Six months' notice shall be given of the sale. When the action is brought for any interest, or instalment of the principal, and there are other instalments to become due subsequently, such action will be dismissed upon payment, before order of sale, of the portion due; if payment be made after the order is entered, the proceedings will be stayed, to be enforced by a further order of the court upon a subsequent default. Wood *v.* Trask, 7 Wis. 566.

It is provided that the action for foreclosure shall be brought in the county where the lands are situated. The plaintiff in his complaint may pray for a judgment for any deficiency which may remain due after sale of the mort-

gaged premises, and judgment may be rendered accordingly. A surety may be made a party to such judgment, which may be enforced against him as well as the mortgagor for the balance remaining after sale of the mortgaged premises.

In case of the sale of mortgaged lands by decree of court, it is the duty of the sheriff to execute a certificate of sale to the purchaser. The mortgagor, his heirs, executors, or assigns, may redeem within one year on paying the purchase-money with ten per cent interest. The mortgagor retains possession until title vests absolutely in the purchaser. Rev. Stat. 1858, pp. 145–154; Stat. 1858, c. 49; Laws 1859, c. 186, 195; 1862, c. 243; 1863, c. 299; 1867, c. 79; 1872, c. 13, 92; 1873, c. 57; Babcock *v.* Perry, 8 Wis. 277.

In *Kentucky*, *Maryland*, *Mississippi*, *New Jersey*, *North Carolina*, *South Carolina*, *Ohio*, *Tennessee*, and *Virginia*, foreclosure is under the general jurisdiction of courts of equity.

In *Maryland*, in a suit in chancery to foreclose a mortgage, the court may decree, that, unless the debt and costs be paid by the time fixed by the decree, the property mortgaged, or so much of it as may be necessary, shall be sold; and such sale shall be for cash, unless the complainant shall consent to a sale on credit. Code 1860, p. 98, art. 16, § 125.

In *Mississippi*, on a suit for foreclosure, if the court shall think the complainant entitled to a decree, a reference may be made to the clerk, or a master, to compute the amount due, who shall proceed without notice to the parties, and make his report without delay; the report shall be confirmed, and a final decree passed, of course, unless cause be shown to the contrary. Rev. Code 1857, c. 62, art. 48; Rev. Code, c. 9, § 1027.

In *Ohio*, it is provided, that, in the foreclosure of a mortgage, a sale of the mortgaged property shall in all cases be ordered; and when the same mortgage embraces separate tracts of land, situated in two or more counties, the sheriff of each county shall be ordered to make sale of the lands situated in his county. Rev. Stat. 1860, c. 87, § 374. In actions for foreclosure, the plaintiff may ask also a judgment for money; and in making sale, the court may order it to be in parcels or entire. Acts 1864, Supp. 1868, pp. 561, 575.

In *Tennessee*, when land is sold under a decree of a court of chancery upon * a foreclosure, the mortgagor may redeem within two years after [*603] such sale, unless upon application of the complainant the court order that the property be sold on a credit of not less than six months nor more than two years; and that, upon confirmation thereof by the court, no right of redemption or re-purchase shall exist in the debtor or his creditor, but that the title of the purchaser shall be absolute. Code 1858, § 2124.

See, for *Kentucky*, Downing *v.* Palmateer, 1 Mon. 64; Martin *v.* Wade, 5 Mon. 80; Caufman *v.* Sayre, 2 B. Mon. 202; Crutchfield *v.* Coke, 6 J. J. Marsh. 89; for *New Jersey*, Nix. Dig. 1855, pp. 525, 526, 528; Rev. Stat. 1875, pp. 476–479; for *North Carolina*, Averett *v.* Ward, Busbee, Eq. 192; Ingram *v.* Smith, 6 Ired. Eq. 97; for *Ohio*, Rev. Stat. 1854, c. 87, § 374; 1860, c. 87, § 374; Supp. 1868, pp. 561–575; for *South Carolina*, Stat. at Large, vol. 4, p. 642; vol. 5, pp. 169, 170; Rev. Stat. 1873, p. 610; for *Virginia*, 1 Lomax Dig. tit. 13, c. 6, p. 397.

In *Connecticut* and *Vermont*, a strict foreclosure is decreed in a court of chancery, whereby the title becomes absolute in the mortgagee, on the failure of the mortgagor to redeem within the time allowed by the decree. In the former State, a petition to foreclose the mortgage may be instituted against the heirs

and creditors of a deceased mortgagor by general description. The foreclosure does not preclude a recovery for the balance of the debt, and the bringing an action therefor does not open the foreclosure. Whenever any mortgage has been foreclosed, and the time limited by the court for redemption has passed, the mortgagee, or person in whom such title has become absolute, shall forthwith make a certificate describing the premises, the mortgage, the record of the same, and the time when the title became absolute; which certificate shall be signed by the party, and recorded in the town where the property is situated. In case of foreclosure by a party not having the legal right to the land, but who is entitled to the money secured by the mortgage, the title vests after the right of redemption has expired, upon the recording of the decree. Gen. Stat. Conn. 1866, c. 3. In *Vermont*, if the premises are not redeemed agreeably to the decree of foreclosure, the clerk of the court of chancery may issue a writ of possession to put the complainant in possession of the premises. Such foreclosure is not effectual as against subsequent purchasers, mortgagees, or attaching creditors, unless a copy of the record or decree of foreclosure is recorded in the town-clerk's office where the land is situated, within thirty days after the expiration of the time of redemption. Gen. Stat. 1863, c. 29, §§ 74–79. Any subsequent attaching creditor may now be joined as defendant in proceedings to foreclose a mortgage. Append. 1870, p. 841.

In *Missouri*, petitions to foreclose mortgages are filed in the circuit court of the county where the real estate is situated, against the mortgagor and the actual occupiers of such real estate; and any person claiming an interest in the mortgaged property may, on motion, be made defendant. Summons shall issue as in ordinary civil actions. When the mortgagor is not summoned, but notified by publication, and has not appeared, the judgment, if for the plaintiff, shall be, that he recover the debt and costs, to be levied on the mortgaged property. But if summoned, or appearing, such judgment shall be rendered with the additions, that if the mortgaged property be not sufficient to satisfy the debt and costs, then the residue shall be levied on other property of the mortgagor. A special *fieri facias* issues in conformity to the judgment upon which the property is sold by the sheriff of the county. Gen. Stat. 1866, c. 153, § 1; 1872, vol. 2, c. 99. A proceeding under the statute is had at law, and not governed by the rules of equity; but a party may foreclose by bill in equity. Riley *v.* McCord, 24 Mo. 265.

[*604] *In *Texas*, under all judgments or decrees for the foreclosure of mortgages against persons other than executors or administrators, an order of sale shall issue to the sheriff of the county where the property subject to such lien or mortgage can be found, directing him to sell the same, if found, as under execution; and if the proceeds of such sale be insufficient to pay the judgment and costs, or if the property cannot be found, further execution may be issued for such balance or for the debt, against such defendant, as the case may be. The action is in the district court. The mortgagee files a petition stating the case and the amount of the demand, and describing the property mortgaged: whereupon the mortgagor is summoned to appear at the next term of the court to show cause why judgment should not be rendered against him; and if he fails to appear, or, appearing, shows no cause, judgment is rendered, and execution issues as in other cases. Oldham & White's Dig. 1859, pp. 131 and 333, arts. 504 and 1476; Lee *v.* Kingsbury, 13 Texas, 68; Paschal's Dig. 1866, pp. 365, 788.

In *Iowa*, no mortgage may be foreclosed in any other manner than by action in court by equitable proceedings. Upon judgment, the court issue a special execution for the sale of the mortgaged property; but if this does not sell for enough to satisfy the execution, a general execution may be issued against the mortgagor. If the premises consist of several parcels, they must, if distinct, be sold separately and not *in a lump*, and only enough of them to satisfy the debt. Boyd *v.* Ellis, 11 Iowa, 97; Maloney *v.* Fortune, 14 Iowa, 417. There is the same period of redemption allowed the mortgagor, or any person having a lien on the premises, as is provided in case of real estate sold on general execution. See *ante*, p. *469; Wilson *v.* Wilson, 4 Iowa, 312; Revision, 1860, c. 146, §§ 3660–3669.

In *Kansas*, it is provided that mortgages shall be foreclosed by petition in the district court of the county in which the real estate is situated. Deeds of trust are deemed mortgages so far as the method of foreclosure is concerned. A sale of the mortgaged property can only be made in pursuance of a judgment of a court of competent jurisdiction ordering such sale. Comp. Stat. 1862, c. 26, § 384, and c. 149; Gen. Stat. 1868, c. 80, § 399.

In *Delaware*, upon breach of the condition, a writ of *scire facias* may be sued out; and, upon the entry of judgment for the plaintiff, he may have execution against the premises by *levari facias*, under which they are sold; or, if there be no sale for want of bidders, a *liberari facias* may issue, under which so much of the mortgaged premises are set off by appraisement as shall satisfy the debt and costs. Rev. Code 1852, c. 111, §§ 55, 60; 1874, c. 111, §§ 55–60.

In *Pennsylvania*, after the expiration of twelve months from the breach of the condition of a mortgage, the mortgagee, or any one claiming under him, may sue out a writ of *scire facias* from the court of common pleas for the county where the mortgaged lands lie; and, on obtaining judgment, he may have execution by *levari facias*, by virtue whereof the mortgaged premises are taken on execution, and exposed to sale as in case of other sales on execution; but, for want of purchasers, they are delivered to the mortgagee or creditor. There is no redemption, and the purchaser's title is not affected by any reversal of judgment. Purdon, Dig. 1861, p. 328, §§ 112–118; 1872, vol. 1, p. 482, §§ 122–128.

In *Nebraska*, on petitions to foreclose, the court may decree sales of the estates, and, upon a report made of sale, may issue execution against other property of the mortgagor for the balance unsatisfied. But no proceedings can be had pending the petition and decree, unless authorized by the court. The sheriff's deed vests in the purchaser the same estate that would be in the mortgagee if the equity of redemption had been foreclosed. Rev. Stat. 1866, p. 542; 1873, p. 655–658.

In *New Jersey*, besides the method of foreclosure in chancery in all suits for the foreclosure and sale of mortgaged premises, where all the mortgaged premises are situated in the same county, the circuit court of said county shall have the same jurisdiction and powers as the court of chancery in like cases. Nixon, Dig. 1855, pp. 525, 526, 528. And see Laws 1858, c. 197, and Laws 1860, c. 65; Rev. Stat. 1875, p. 478, § 9.

In *Illinois*, if default be made in the payment of any sum of money secured by mortgage on real property, and if the payment be by instalments, and the last shall have become due, the remedy of *scire facias* may be had on the mortgage. The lands are sold to satisfy the debt, subject to the same right of redemption as upon execution. Comp. Laws, 1857, p. 976. Where a bill

[*605] for a foreclosure * shows that the mortgage was given for the entire purchase-money, no part of which has been paid, and the premises are but a slender and the only security for the debt, the mortgagors having absconded, a strict foreclosure is proper. Wilson *v.* Geisler, 19 Ill. 49; Young *v.* Graff, 28 Ill. 29; Rev. Stat. 1874, c. 95, § 17.

In *Maine*, *New Hampshire*, *Massachusetts*, and *Rhode Island*, mortgages may be foreclosed by entry into the mortgaged premises under process of law, or by entry *in pais*, openly and peacefully made; and such possession obtained in either mode, continued peacefully for a certain period, will for ever foreclose the right of redemption. This period of possession is three years, except in *New Hampshire*, where it is one year. In *Maine*, *Massachusetts*, and *Rhode Island*, the entry must be made in the presence of two witnesses, and verified by their affidavit, and duly recorded; and in the latter State such witnesses shall give to the mortgagee, or other person taking possession under him, a certificate of such possession being taken; and the person delivering possession shall acknowledge the same to have been voluntarily done, before a justice of the peace; which certificate and acknowledgment shall be recorded in the clerk's office of the town where such mortgaged estate lies. In *Maine*, the mortgagee may also enter into possession of the premises, and hold the same by consent in writing of the mortgagor or person claiming under him; and in *Massachusetts*, a memorandum or certificate of the entry may be made on the mortgage-deed, and signed by the mortgagor or the person claiming under him, and recorded. In *Maine* and *Massachusetts*, in an action for possession, if the plaintiff is entitled to possession, and the defendant is the mortgagor or his assignee, or one entitled to hold under him, the court, on motion of either party, award a conditional judgment, that if the defendant shall within two months pay the sum found due on the mortgage, with interest and costs, the mortgage shall be void; otherwise that the plaintiff shall have execution for possession and for costs of suit. This writ of entry is so far like a bill in equity, that the court determine what is due upon the mortgage by the rules of equity. Holbrook *v.* Bliss, 9 Allen, 69; Hart *v.* Goldsmith, 1 Allen, 147; Cronin *v.* Hazletine, 3 Allen, 364; Kilborn *v.* Robbins, 8 Allen, 472. In such case, the mortgage may be redeemed within three years.

In *Maine*, foreclosure may also be effected by a public notice in the State paper, and a record of the same in the registry of deeds; or by causing an attested copy of such notice to be served upon the mortgagor or his assignee, and recording the same; and in such case, if the mortgagor, or person claiming under him, does not redeem within three years after the first publication, or service of the notice, his right of redemption shall be for ever foreclosed. In *New Hampshire*, a notice of the possession, the object of it, and a description of the mortgage and of the premises, must be published in some newspaper, the first publication to be six months before the time of foreclosure. And if the mortgagee be in possession, foreclosure is effected by publication in a newspaper of a notice, stating that from and after a certain day specified, and not more than four months after the last day of publication, such possession will be holden for the purpose of foreclosing the right to redeem the same for condition broken, and by retaining actual peaceable possession of the premises for one year from and after the day specified in such notice. Gen. Stat. 1867, c. 122. In *Rhode Island*, any person also entitled to foreclose may prefer a bill to foreclose in the supreme court sitting in the county in which the premises are situated; which bill may

be heard, tried, and determined according to the usages in chancery and the principles of equity. See Maine Rev. Stat. 1857, c. 90, §§ 1-12; and see Acts 1862, c. 129; Rev. Stat. 1871, c. 90, §§ 1–13; Acts 1872, p. 24; Massachusetts Gen. Stat. c. 140; Stat. 1862, c. 179, § 7; New Hampshire, Gen. Stat. 1867, c. 122; Rhode Island Rev. Stat. 1857, c. 149, §§ 4, 5, 16; Gen. Stat. 1872, c. 165, §§ 4, 5, 14. The statute of Massachusetts, as to foreclosure of mortgages, applies only to legal mortgages. Wyman *v.* Babcock, 2 Curtis, C. C. 386. An entry on a * part of the land mortgaged by one gen- [*606] eral description, followed by three years' possession, forecloses the whole land. Lennon *v.* Porter, 5 Gray, 318. So an entry on one of two separate tracts of land, both situated in the same county, and mortgaged by the same deed, on the same condition, is, as between the parties and their privies, an entry on the whole. Bennet *v.* Conant, 10 Cush. 163; Hawkes *v.* Brigham, 16 Gray, 565. A mortgagee does not, by bringing a writ of entry to foreclose and obtaining a conditional judgment, waive his right to take possession of the land during the two months allowed to the mortgagor to pay the amount ascertained by the judgment to be due. Mann *v.* Earle, 4 Gray, 299. A second mortgagee of land may enter and take possession for the purpose of foreclosure while the first mortgagee is in for the like purpose; and, if the second mortgage is foreclosed before the first, such foreclosure will cut off the equity of redemption of that mortgage and all subsequent mortgage-rights, though such mortgages are held by the first mortgagee. Palmer *v.* Fowley, 5 Gray, 545.

BOOK II.

INCORPOREAL HEREDITAMENTS.

CHAPTER I.

HEREDITAMENTS PURELY INCORPOREAL.

SECT. 1. Rents.
SECT. 2. Franchises.
SECT. 3. Easements.

SECTION I.

RENTS.

1. General nature of incorporeal hereditaments.
2. What constitute such as are purely incorporeal.
3. Rents defined.
4. What is rent service.
5. Of rents charge and rents seck.
6. How far rent service is in use here.
7. General character of rents, and how created.
8. Estates in rents.
9. How far they are subject to dower or curtesy, &c.
10. When and how rents are applied.
11. How far rents are in use here.
12. Remedy for recovering rents.
13. Rents upon condition, how enforced.
14. Actions to recover rents.
15. Effect on rent of parting with land charged.
16. Of covenants for rent running with land.
17. Covenant for rent not assignable after due.
18. Apportioning rents.
19. Escheat of rents.
20. Of merger of rents in the fee of land.

1. THUS far, the subjects treated of in this work have referred chiefly to property of a corporeal nature, like lands or

tenements, something of which livery of seisin, as heretofore explained, might be made. But enough must have presented itself, in the course of these investigations, to prepare the reader to pursue a similar course of inquiry in respect to another species of property, which, though relating to lands and embraced under the general designation of realty, will be found to differ, in many essential particulars, from that which has been hitherto described. The property now to be spoken of consists of an intangible, incorporeal interest in, or right to, or out of, lands and tenements, of a nature sufficiently permanent to have applied to it the same idea of duration or quantity of ownership or estate as has thus far been applied to corporeal inheritances. They are thus described by Bracton: *Incorporales verò sunt, sicut sunt jura, quæ videri non possunt nec tangi.*[1] Thus A may have an estate in possession in lands during his *life; B may have a right to these [*4] on A's death, or may have it upon condition that he survives A, or that A die without children. But he cannot touch or handle this interest; and if he sells it, he can only pass it by deed, since he has no present seisin which he can deliver to the purchaser. Here A has a corporeal and B an incorporeal property in the same land; though B's interest in such a case, so far as it is a reversion or a vested remainder, is considered as of a mixed nature, at one time incorporeal, but capable of becoming corporeal by being united with the possession at the death of A.[2] Hereditaments may, on the other hand, be purely incorporeal, as, for example, what are called rights of common, or rights of way appurtenant to other lands. Thus A may own Blackacre, and have a right to go upon B's adjacent land to cut trees to burn on his own, or to pass across B's land to reach his own. Now, this is simply a right which he cannot sell and deliver over to a stranger separate from the land to which it is appendant, — nothing, in other words, corporeal or tangible. And yet it may be an inheritable right, which will survive to his heirs, and in which he may have an estate in fee-simple; or it may be for his life only, in which case he would have a life-estate in it, in the

[1] P. 7. [2] Wms. Real Prop. 197.

same manner as he might have in corporeal property. But in no event can an incorporeal hereditament like this become a corporeal one.[1] Property like this is not, properly speaking, regarded as a *tenement*, nor is it *land;* but being something that is of a permanent nature, and may be inherited, it is called a *hereditament*.[2]

2. Blackstone enumerates ten of the purely incorporeal hereditaments. But as neither tithes, advowsons, commons, as understood in England, offices, dignities, corodies, nor pensions, are known to the American law as things of which an estate can be predicated,[3] and as annuities are but [*5] claims of a personal *nature,[4] — and this rule still appears to be applied in Pennsylvania, where the statute *Quia Emptores* has never been adopted,[5] — the only classes of incorporeal real property of which it is now proposed to treat are Rents, Franchises, and Easements.

3. Rent is defined to be a right to the periodical receipt of money or money's worth in respect of lands which are held in possession, reversion, or remainder, by him from whom the payment is due.[6] As technically defined, it is something which a tenant renders out of the profits of the lands or tenements which he enjoys.[7]

4. There was, before the statute of *Quia Emptores*, a custom for the owner of the feud, on parting with his entire estate, to reserve something to himself and his heirs by way of perpetual periodical service, or an equivalent thereto, by way of rent or return; upon a failure to perform which on the part of the tenant, the owner of the rent might distrain for the same. This right of distress grew out of the *tenure* existing between the grantor and tenant, the latter owing fealty

[1] Wms. Real Prop. 265.

[2] 2 Bl. Com. 17; Prest. Est. 13, 14. Burton, however, in his Compendium, applies the term "tenement" to incorporeal as well as corporeal hereditaments. Burt. Real Prop. §§ 4, 40; Van Rensselaer *v.* Read, 26 N. Y. 566; Van Rensselaer *v.* Platner, 2 Johns. Cas. 26.

[3] By a law of Mass. 1660, no cottage or dwelling-house was to be admitted to the privilege of commonage for wood, timber, and herbage, except "by consent of the town." See Col. Laws, 196; Thomas *v.* Mansfield, 10 Pick. 367.

[4] Wms. Pers. Prop. 165.

[5] Wallace *v.* Harmstad, 44 Penn. 496, 498.

[6] Burt. Real Prop. § 1050. [7] Co. Lit. 142 a; Watk. Conv. 273.

as well as rent for the estate. This periodical render was called a *rent service*. But as the statute of *Quia Emptores* abolished all tenure between a grantor in fee and his grantee, by destroying the possibility of reversion, it operated to extinguish the fee in the owner of such a rent.[1] But when there is a reversion, as fealty is always due from the tenant to the reversioner, a rent from a tenant for years to his reversioner is still a good rent service, and was treated of accordingly, under the head of Leases and Estates for Years, in a former chapter.[2]

5. It is not of rent service, as above explained, that it is proposed to treat in this chapter, but of rents, which, from their duration and transmissible and inheritable quality, come under the proper designation of incorporeal hereditaments. These are rents charge and rents seck, or what answer in many cases to both of them, *fee-farm rents*.[3] "There are," say the court in —— *v.* Cooper, "two ways of creating a rent: the owner either grants a rent out of it, or grants the lands, and reserves a rent. There is no such thing as a rent seck, rent service, or rent charge, issuing out of a term for years."[4] Thus, if an owner of land in fee grants it to another in fee, and in his deed reserves an * annual sum of money, [*6] or something money's worth, to be paid by the grantee or his heirs or assigns to him and his heirs, or if, being owner in fee of the land, he grants to another and his heirs an annual sum to issue out of his said lands for ever, these annual payments thus granted or reserved are called rents, although not strictly any thing in the way of profits reserved or to be rendered out of the thing granted.[5] For this reason, while the

[1] Smith, Land. & Ten. 90; 3 Prest. Abst. 54; Burt. Real Prop. §§ 1053, 1054; Van Rensselaer *v.* Read, 26 N. Y. 563; Wallace *v.* Harmstad, 44 Penn. 495, 498.

[2] Smith, Land. & Ten. 90; Com. Dig. Rent, c. 1; *ante*, vol. i. c. 10; Com. Land. & Ten. 97.

[3] 3 Prest. Abs. 54. These answer to *Emphyteusis* of the Civil Law, the one owing the rent being called the *Emphyteuta;* though, in its broader sense, *Emphyteusis* embraced estates for years, where the tenant paid rents. Ayliff, 473, 474.

[4] —— *v.* Cooper, 2 Wils. 375; Langford *v.* Selmes, 3 Kay & J. 229. See 5 Bligh, N. S. 63.

[5] Watk. Conv. 273, Coventry's note, 276–8; 3 Prest. Abst. 55.

common law gave to the reversioner, in case of a rent service, the remedy of distress for its recovery if unpaid, there was no such right attached to rents granted or reserved as above supposed, unless it was so stipulated in the deed or indenture by which the rent was created. If the owner of the rent was empowered, at its creation, to enforce its payment by distress, it was considered as charged upon the land, and therefore called a *rent charge*.[1] If no right of distress was attached to the rent at its creation, it was called a *rent seck* (*siccus*), or dry rent, being a mere right to recover the rent, without any right to seize upon the property out of which it was supposed to issue or be derived.[2] By the statute 4 Geo. II. c. 28, § 5, a right of distress, whether for rent seck or rent charge, was given, so that, by the English laws, the distinction between the two is substantially abrogated.[3] * In New York, a rent reserved upon a conveyance in fee is a rent charge, and not a rent service.[4]

6. Before proceeding to speak further of what may be properly called *fee-farm rents*, which include both rents charge and rents seck,[5] it should be stated, that if, in any of the States, the statute of *Quia Emptores* has not been adopted as a part of their common law, rents service in
[*7] fee as well as for terms of *years may still be in use. This is the case in Pennsylvania, and many cases have arisen there where the rent granted or reserved was in fee, and, if reserved, has been held to be a rent service, and not a

* Note. — There was, under the feudal law, what was called a quit-rent, which was a fixed sum payable to the lord as seignior of a manor, by a tenant, upon a composition made with the lord, who gave up therefor his claim for *indefinite* services due from the tenant. 2 Bl. Com. 96; Marshall *v.* Conrad, 5 Call, 364, 398.

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[1] 2 Bl. Com. 42; Cornell *v.* Lamb, 2 Cow. 652, 659.

[2] Wms. Real Prop. 270; 2 Bl. Com. 42; Cornell *v.* Lamb, 2 Cow. 652, 659; Wallace *v.* Harmstad, 44 Penn. 495, 498.

[3] Wms. Real Prop. 270, n.

[4] Van Rensselaer *v.* Hays, 19 N. Y. 68; Van Rensselaer *v.* Chadwick, 22 N. Y. 33, s. c. 24 Barb. 333; Van Rensselaer *v.* Smith, 27 Barb. 134, 139; Tyler *v.* Heidom, 46 Barb. 449, where there is a summary of the various points made and ruled in the Van Rensselaer cases in New York.

[5] Scott *v.* Lunt, 7 Pet. 596, 606; Bradbury *v.* Wright, Dougl. 627, n.; Co. Lit. 143 b, note 235.

rent charge, and where, as was the case at common law, a release of a part of the land, out of which the ground rent which had been thus reserved issued, discharged the rent *pro rata* only.[1]

7. The nature and general incidents of the rents mentioned, regarded as interests in land of which estates may be predicated, are so nearly identical (except in the matter of enforcing them), that it is proposed to consider rents charge and seek together under the term of *fee-farm rents*. These rents may be created by reservation, by limitation of a lease, or by grant,[2] by bargain and sale, lease and release, or covenant to stand seised,[3] which, as the reader will hereafter see, is substantially saying, in any form of conveyance by which lands themselves may be conveyed. Where a rent is granted, it is itself the subject of the grant; where it is reserved, it is the lands that are the subject of the grant, and the rent comes in lieu of the land.

8. The estate in the rent may be a fee-simple, a fee-tail, for life, or for years. To constitute a fee-simple, the rent must be reserved to the grantor, his heirs and assigns, or, if granted, by like words of inheritance. If for years, it may be to one without words of limitation, or, as is often done, to one and his executors, administrators, and assigns. So the limitation may be to one in tail, with remainders over.[4] The rent must, if created by reservation, be reserved to the feoffor, donor, or lessor, and not to a stranger,[5] and this may be by deed poll.[6] * But it may be created by grant to a stranger.[7] [*8] A rent reserved upon a lease in fee, with a clause of distress, is such an interest in land as may be levied upon for the

[1] Ingersoll *v.* Sergeant, 1 Whart. 337, where the subject is very elaborately examined. Franciscus *v.* Reigart, 4 Watts, 98, 116; 2 Sharsw. Bl. Com. 42, n. The statute of *Quia Emptores* forms a part of the common law of New York. Van Rensselaer *v.* Hays, 19 N. Y. 68; Wallace *v.* Harmstad, 44 Penn. 495.

[2] 3 Prest. Abst. 53.

[3] Watk. Conv. 281; 3 Cruise, Dig. 273.

[4] Van Rensselaer *v.* Hays, 19 N. Y. 68; Watk. Conv. 280, 281; Wms. Real Prop. 275; 3 Cruise, Dig. 590; Tud. Lead. Cas. 177, 178.

[5] Though Burton says a reservation of a rent to a stranger would probably be considered a grant to him. Burt. Real Prop. § 1103; 3 Cruise, Dig. 278; Lit. § 346.

[6] 2 Dane, Abr. 452.

[7] Ingersoll *v.* Sergeant, 1 Whart. 337

debt of him who owns it; though it seems, if it had been a rent seck, it would not be the subject of such a levy.[1] When a rent has been once granted or created, it is itself a subject of grant afterwards like other estates,[2] and is descendible to heirs.[3] It may be granted to one for life, with remainder over to another,[4] though at common law an existing rent cannot be granted to take effect *in futuro*. But rents are expressly included in the Statute of Uses, 27 Henry VIII. c. 10, and may be conveyed to uses like land itself, as will be explained hereafter.[5]

9. Such a rent is subject to curtesy or dower like lands held in fee-simple or fee-tail,[6] the requisite seisin being a seisin in law, as there can be none in fact. And for that reason, where one has been once seised or possessed of a rent, he cannot be disseised, as the possession always follows the right.[7] The only mode of gaining a seisin of a rent is by accepting or receiving some part thereof.[8] From the general analogy that exists between fee-farm rents and lands, in respect to estates therein and their incidents, it is not deemed necessary to pursue the subject into all its details; but it may be proper to consider the purposes to which these rents usually are applied, and how far they prevail in this country.

10. They seem to have been first adopted for the purpose of carving out an interest in lands in favor of some one other than the heir, without disturbing the feud. But as it was in derogation of the feudal rights, the law did not annex the remedy for enforcing the payment of the rent by distress, unless the parties specially agreed thereto. In modern [*9] days, rents are *created for the purpose of raising jointures for married women, or making provision for heirs, by anticipation, to constitute them freeholders, or for raising money by way of annuity chargeable upon real estate, and the like. And between these and mortgages there are obvious distinctions, though the intended effect may be the same.

[1] The People *v.* Haskins, 7 Wend. 463.
[2] 3 Prest. Abst. 53.
[3] 3 Cruise, Dig. 285; Van Rensselaer *v.* Hays, 19 N. Y. 68.
[4] 3 Cruise, Dig. 292; Van Rensselaer *v.* Read, 26 N. Y. 564, 572.
[5] 3 Cruise, Dig. 293, 294; Watk. Conv. 281.
[6] 3 Cruise, Dig. 291.
[7] 3 Cruise, Dig. 295; Burt. Real Prop. § 1116.
[8] 3 Cruise, Dig. 274.

In the case of a mortgage, for instance, there is a debt to be returned to the mortgagee. In that of a rent, there is an absolute purchase, and nothing is to be returned to the purchaser but what he is to receive from year to year out of the estate. And if the owner of the land extinguish the rent by the payment of a sum of money, it is in the nature of a purchase instead of a redemption.[1] Such a rent cannot of course continue any longer than the estate in the land of him who created it. If, therefore, he has a fee-simple, he may create a rent for a term of years, or for life, or in fee, though to have it a good rent it must be created by one who is *seised* of land; for a rent cannot be granted or created out of an incorporeal inheritance, and it must be done by deed.[2] *

11. It would seem, that, though fee-farm rents are unusual in this country, the same reason may often exist here for creating them as in England; and with the exception of the matter of remedy to enforce the same, there seems to be nothing in the law here inconsistent with their being brought into more general use. Mr. Dane, speaking of rent charge, says: "It may exist in Massachusetts, for men by their deeds may grant such *rent;" and adds, "In some [*10] States this species of rent may be common."[3] And Mr. Walker, speaking of another State, says: "It is scarcely known in Ohio, though undoubtedly it might exist there."[4] In New Jersey, the court, in a case involving a question of a

* NOTE. — It is said that estates in fee-simple in rents charge are not uncommon in Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee-simple in lands, for building-purposes, in consideration of a rent charge, in fee-simple, by way of ground-rent granted out of the premises to the original owner. These are created by a conveyance from the vendor to the purchaser and his heirs, which is recited to be to the use that the vendor and his heirs may thereout receive the rent charge agreed on, followed by a clause giving a right to distrain, and then to the further use, that, in case of non-payment within so many days, the vendor or his heirs may enter and hold possession till all arrears are paid. Wms. Real Prop. 275.

[1] Watk. Conv. Coventry's note, 276, 277.

[2] Lit. § 218; Wms. Real Prop. 270; 2 Dane, Abr. 452.

[3] 3 Dane, Abr. 450; Adams *v.* Bucklin, 7 Pick. 121, 123, which was a case of a rent charge reserved upon a grant of land in fee. Fee-farm rents exist in Missouri. Alexander *v.* Warrance, 17 Mo. 228.

[4] Walk. Am. Law, 265.

rent charge, say: "The rent is therefore a perpetuity or a fee-simple like the land itself to one and his heirs and assigns for ever."[1] In Virginia, the court recognized the validity of a rent which was reserved in a deed of an estate in fee-simple.[2] And in New York, a rent charge reserved out of a grant in fee is good, and descends to the heirs of him in whose favor it is reserved. Such covenants to pay rent run with the land as a burden; such rent charge may also be devised.[3] Nor can the personal representative of the grantor, to whom rent was reserved, have any action to recover rent upon default happening after the grantor's death. Nor can the devisee of rent maintain an action against the personal representative of the original covenantor for any default of payment occurring after the covenantor's death.[4]

12. In respect to the remedy for the recovery of a fee-farm rent, it has already been remarked, that the common law gave the owner of a rent service the right to distrain the tenant's cattle or other personal property upon the premises for the purpose of compelling the payment thereof; and this right still exists in Pennsylvania.[5] It has also been stated, that the English statute extended the right of distress to cases of rent charge and rent seck.[6] The right of making distress in case of rent charge existed in New York until 1846, when it was abolished by statute.[7] It never existed in the New England States.[8] But the common-law right of distress, as modified by the statute 4 Geo. II. c. 28, has been adopted as the law of many of the States. Those enumerated by Judge Kent are New Jersey, Pennsylvania, Delaware, Indiana, Illinois, Maryland, Virginia, Kentucky, Misssisippi, South Carolina, and Georgia; while in North

[1] Farley *v.* Craig, 6 Halst. 262, 267.

[2] Wartenby *v.* Moran, 3 Call, 424. See also Scott *v.* Lunt, 7 Pet. 596, 602, a case in the District of Columbia; Marshall *v.* Conrad, 5 Call, 364, 406.

[3] Van Rensselaer *v.* Hays, 19 N. Y. 68.

[4] Van Rensselaer *v.* Read, 26 N. Y. 565; Van Rensselaer *v.* Platner, 2 Johns Cas. 17; Williams's Appeal, 47 Penn. 290.

[5] Smith, Land. & Ten. 161, n.; 2 Sharsw. Bl. Com. 43, n.

[6] Taylor, Land. & Ten. 231; 3 Prest. Abs. 54.

[7] Guild *v.* Rogers, 8 Barb. 502.

[8] 2 Dane, Abr. 451; 3 Kent, Com. 473, n.

Carolina and Alabama it has been directly or indirectly abolished by legislation, and does not exist in Tennessee or Ohio.[1] It exists in Wisconsin, and in Iowa a statute creates a lien for rent in favor of a landlord upon the crops and other personal property upon the premises.[2] So it is stated in the note to Morris's edition of Smith's Landlord and Tenant, that the common law upon the * subject of distresses for [*11] rent has been adopted very generally in the United States.[3] As the purpose of this chapter is rather to define the right than to prescribe the forms, in detail, of the remedy, the reader must be referred to treatises designed for that purpose for the law as to when, where, and how distresses may be made use of as a means of enforcing the payment of rents.[4]

Whether there is a power of distress or not, the one to whom the rent is due may have a remedy by action at law to recover the same from him who holds the land out of which it is payable. Thus where, upon a lease in fee, there was reserved a certain rent, and a covenant in the lease on the part of the lessee, binding himself and all holding his estate to the payment thereof, it was held that a reversioner could recover rent, *pro rata*, from one who held a part of the leased estate.[5] And the assignee of a rent may recover, though he have no reversion in the land.[6] And there is sometimes a right reserved to the holder of the rent to enter upon the premises, and either defeat the title of the owner thereof, as for a breach of a condition, or, what is more common, hold the same until he shall have been reimbursed the rent out of the income of the estate. The form of the action, as well as the extent of the right of entry by the holder of the rent, depends upon the terms of the deed by which the rent was created.

13. Thus one may enfeoff another in fee, reserving to himself and heirs a rent, with a condition that he may enter and repossess himself of the original estate upon non-payment

1 3 Kent, Com. 472, 473.

2 Coburn *v.* Harvey, 18 Wis. 147; Grant *v.* Whitwell, 9 Iowa, 154.

3 Smith, Land. & Ten. 161, n.

4 Smith, Land. & Ten. Morris's ed. 157, 186; Tud. Lead Cas. 188, 194.

5 Van Rensselaer *v.* Bonesteel, 24 Barb. 365.

6 Van Rensselear *v.* Read, 26 N. Y. 564.

thereof. This constitutes a conditional estate which the grantor or his heirs may be able to enforce, but not an assignee or grantee of the rent.[1] A case like this is cited below. It is not properly a lease, because the claimant of the rent has no reversion. But it was held to create a lien upon the land for the payment of the rent, which would take precedence of a mortgage made by the first purchaser of the premises to a stranger.[2] This condition may be enforced by entry without previous notice and demand, if the parties so agree, by the instrument granting the estate.[3] But where, as is usual, a demand of the rent must be made before undertaking to enter and defeat the estate, the law is exceedingly strict as to the manner in which this is to be done. The rent demanded must be the precise sum that is due, not a penny more nor less. The demand must be precisely on the last day at which it is due, and at a convenient hour before sundown, so that the money may be accurately counted. It must be made on the premises, if no other place is specified, at [*12] the front door of the house, if * there is a house thereon, otherwise upon the most notorious part of the land, whether any one is upon it or not; though by statute 4 Geo. II. c. 28, § 2, provision is made for bringing ejectment without actual entry in certain cases.[4]

Instead of a condition in the instrument giving the grantor a right to enter and defeat the grantee's estate altogether upon non-payment of the rent reserved, it may be so framed that the grantor may enter and hold possession until he makes the rent out of the enjoyment of the estate, in which case the land goes back to the grantee or his assigns. And by the way of a use, to be hereafter explained, the right to enter for this purpose may be reserved to another than the grantor and his heirs.[5] And this right to hold for the rent may be defeated at any time by the payment of the balance due; nor is so nice an observance of the rule as to a demand

[1] Lit. § 325, and note 84. [2] Stephenson *v.* Haines, 16 Ohio St. 478.

[3] Co. Lit. 201, note 85.

[4] Co. Lit. 201, 202; 1 Wms. Saund. 287, n. 16; Farley *v.* Craig, 6 Halst. 262, 268; Stearns, Real Act. 26, 27; *ante*, vol. 1, p. *321.

[5] Lit. § 327; Co. Lit. 203, and note 93; Farley *v.* Craig, 6 Halst. 262, 267.

of rent before making entry necessary in such a case, as where the effect of the entry would be to defeat the entire estate.[1]

14. The form of action to be adopted for the recovery of the rent seems to depend upon the form of the instrument by which this was created. If by indenture the grantee of the land and grantor of the rent covenants to pay, the covenantee may have covenant for the same.[2] If the rent is reserved in a deed-poll, inasmuch as the grantee signs nothing, nor binds himself by any express agreement on his part, covenant would not lie, but assumpsit would.[3] And, in most cases, an action of debt lies for the recovery of rent.[4] These are independent * of the common-law right of [*13] the person seised of a rent to enforce the same against the land by a writ of assize[5] or by ejectment, which may be brought by the assignee of a fee-farm rent reserved, if with it is reserved a right of distress or re-entry for non-payment of the same.[6] Nor would the abolishing of the right to distrain affect the right of the holder of the rent to avail himself of any other remedy he may have under the contract by which it was created. A substantial remedy still exists for the recovery of rent, the same that exists under the laws for the recovery of every other debt, — the obligation of the contract is unimpaired.[7] As a general proposition, whoever is

[1] Co. Lit. 202, 203; Farley *v.* Craig, 6 Halst. 262, 270, was a case of ejectment to recover a parcel of land, to hold and take the profits until they should satisfy the arrears of a certain rent charge created by a deed from Logan to Smith, in fee, reserving a rent in fee, the defendant claiming the land by mesne conveyances from Smith, and the plaintiff claiming the rent by conveyance from Logan's heirs.

[2] 3 Cruise, Dig. 288; Porter *v.* Swetnam, Styles, 406; Parker *v.* Webb, 3 Salk. 5; Vyvyan *v.* Arthur, 1 B. & C. 410.

[3] Adams *v.* Bucklin, 7 Pick. 121; Goodwin *v.* Gilbert, 9 Mass. 510; Newell *v.* Hill, 2 Met. 180; Johnson *v.* Muzzy, 45 Vt. 419; Burbank *v.* Pillsbury, 48 N. H. 476; Hinsdale *v.* Humphrey, 15 Conn. 433; Trustees *v.* Spencer, 7 Ohio, Pt. 2, 149; Gale *v.* Nixon, 6 Cow. 445. But see Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35.

[4] Duppa *v.* Mayo, 1 Saund. 281; 3 Cruise, Dig. 288.

[5] Stearns, Real Act. 188; Lit. § 233; Steph. N. P. 1223.

[6] Marshall *v.* Conrad, 5 Call, 364, 405.

[7] Guild *v.* Rogers, 8 Barb. 502, 504; Van Rensselaer *v.* Slingerland, 26 N. Y. 587; Jemmot *v.* Cooly, 1 Lev. 170; Van Rensselaer *v.* Dennison, 35 N. Y. 400; Tyler *v.* Heidorn, 46 Barb. 442.

entitled to a sum of money charged upon land, without any existing covenant between the tenant and himself, may have assumpsit to recover the same.[1]

15. An assignee of land charged with a rent is liable to the grantee of the rent by reason only of holding the land, and ceases, therefore, to be liable for any rent accruing after he shall have parted with the estate. In one case the court say: "Debt lies by a lessor against the assignee only upon privity of estate; and when this fails by the assignment over, the action is at an end."[2] But there is such a privity between the assignee of rent and an assignee of the land who is bound by the covenant of his assignor to pay it, that the former, without any reversion in the land, can maintain an action at law on the covenant against the latter.[3] The same rule applies as to a rent in fee, for life or for years, when severed from the reversion.[4] And it was held in Pennsylvania, that the assignee of an aliquot part of a ground-rent might recover for the same against the party who owes it, and might sue for it in his own name.[5] It was held by the Supreme Court of the United States, that an assignee of a fee-farm rent might maintain covenant for its recovery in his own name, by virtue of the statute 32 Hen. VIII. c. 34, by which the common law was altered so that the grantee of the reversion of a *leasehold* estate might sue for the accruing rent in his own name. They also held, that the action would lie against the personal representatives of the lessee from whom the rent was reserved.[6] But this law as to the right of an assignee of a covenant to sue for a breach of it in his own name in any case, un-
[*14] less some estate, to which the covenant is *attached, passes with the assignment of the covenant, is contro-

[1] Swasey *v.* Little, 7 Pick. 296.

[2] Pitcher *v.* Tovey, 4 Mod. 71, 76, s. c. 12 Mod. 23; Hiester *v.* Schaeffer, 45 Penn. 538.

[3] Van Rensselaer *v.* Read, 26 N. Y. 572, 573, 579; Springer *v.* Phillips, 71 Penn. St. 63.

[4] Ib. Van Rensselaer *v.* Dennison, 35 N. Y. 400; *ante*, vol. 1, p. *338.

[5] Cook *v.* Brightly, 46 Penn. 445.

[6] Scott *v.* Lunt, 7 Pet. 596, 602; Van Rensselaer *v.* Hays, 19 N. Y. 68, 80, 98; 2 Sugd. Vend. 6th Am. from 10th Eng. ed. 482. But *quære*, if the statute 32 Hen. VIII., c. 34, applies to covenants where there is no reversion. Quain's Appeal, 22 Penn. 510; Williams's Appeal, 47 Penn. 290.

verted by Mr. Hare, in his note to Spencer's case, and is at variance with a case in New York, where it was held that the statute 32 Hen. VIII., c. 34, did not apply to cases of a fee-farm rent.[1]

A distinction has been sometimes supposed to exist between a rent reserved and one granted, so far that, in the latter case, the grantee of the land out of which it was granted should not be charged with the covenant to pay the rent; and the language of Lord Holt, as given by Lord Raymond in his report of Brewster *v.* Kitchin,[2] has been relied on as sustaining this distinction. But Denio, J., in Van Rensselaer *v.* Hays, above cited,[3] insists that the language of Lord Holt has been misapprehended, and quotes with approbation the language of Sir Edward Sugden: "Covenants ought to be held to run in both directions with the rent or interest carved out of or charged upon it (the land) in the hands of the assignee, so as to enable him to sue upon them, and with the land itself in the hands of the assignee, so as to render him liable to be sued upon them."[4] The court add: "There seems to be no distinction favorable to the defendant between a perpetual rent charge *granted* by the owner of the estate and a like rent reserved by a conveyance in fee by indenture, where the grantee covenants for himself and his assigns to pay it."

16. It has also been attempted to maintain the doctrine, that

[1] Smith, Lead. Cas. 5th Am. ed. 152, 153; Van Rensselaer *v.* Platner, 2 Johns. Cas. 24. This case is commented on in Van Rensselaer *v.* Hays, 19 N. Y. 80, where the judge was inclined to hold, if it had not been for the cases cited, that covenants would run with rents into the hands of the assignees of such rents, relying upon 2 Sugd. Vend. 6th Am. from 10th Eng. ed. 482. See Van Rensselaer *v.* Smith, 27 Barb. 104, 143, 146; *ante*, vol. 1, p. *327. See McQuesney *v.* Hiester, 33 Penn. St. 435; Van Rensselaer *v.* Bonesteel, 24 Barb. 265. The above-cited statute is not in force in Ohio, but an assignee may sue in his own name. Masury *v.* Southworth, 9 Ohio St. 346; Van Rensselaer *v.* Read, 26 N. Y. 570.

[2] Brewster *v.* Kitchin, 1 Ld. Raym. 317, 322.

[3] Van Rensselaer *v.* Hays, 19 N. Y. 68, 90, 91; Tyler *v.* Heidorn, 46 Barb. 442, 451.

[4] 2 Sugd. Vend. 492. See also, upon the same subject, Co. Lit. § 217, 218; Morse *v.* Aldrich, 19 Pick. 449; Plymouth *v.* Carver, 16 Id. 183; Taylor *v.* Owen, 2 Blackf. 301; Van Rensselaer *v.* Read, 26 N. Y. 566, 570, 571, 574, 580; Scott *v.* Lunt's Adm'r, 7 Peters, 596; Holmes *v.* Buckley, Prec. in Ch. 39, 1 Eq. Cas. Abr. 27, pl. 4. See Bronson *v.* Coffin, 108 Mass. 175.

although the *burden* of a covenant to pay rent may not be imposed upon land in favor of a stranger, so as to run with it, and bind an assignee of the land, a stranger may covenant with the land-owner in such a manner as to attach the [*15] *benefit* of * the covenant to the land, and have it run with it in favor of whoever may become the owner thereof. It is not pretended that this can be done except where the covenant is to do some act for the benefit of the estate upon the land itself. The doctrine above stated is advocated by the editor of the American edition of Smith's Leading Cases,[1] is favored by the English Commissioners upon Real Property,[2] and is assumed to be law in the cases cited below.[3] To sustain it, reference is also made to Pakenham's case,[4] commonly known as the Prior and Convent case, and to Coke's opinion.[5]

But it is believed that the point has never been determined in this way by a full court, though assumed by individual judges, and that, respectable as these opinions in its favor may be, the doctrine contended for is opposed to well-settled principles as well as the highest authority. With a very few exceptions, the uniform current of authorities, from the time of Webb *v.* Russell[6] to the present day, requires *a privity of estate* to give one man a right to sue another upon a covenant where there is no privity of contract between them; and consequently that where one who makes a covenant with another in respect to land neither parts with nor receives any title or interest in the land, at the same time with and as a part of making the covenant, it is at best a mere personal one, which neither binds his assignee, nor enures to the benefit of the assignee of the covenantee, so as to enable the latter to maintain an action in his own name for a breach thereof.

[1] 1 Smith, Lead. Cas. 5th Am. ed. 124; Id. 140 *et seq.*

[2] 3 Report Eng. Com. 52.

[3] Per Jewett, J., Allen *v.* Culver, 3 Denio, 284, 301; Dickinson *v.* Hoomes, 8 Gratt. 353, 403, by Moncure, J.

[4] Year B. 42 Edw. III. 3 pt. 14, which is fully stated in 2 Sugd. Vend. 6th Am. from 10th Eng. ed. 473. See also Keppell *v.* Bailey, 2 Mylne & K. 517, 539

Co. Lit. 384 b. See also Rawle, Cov. 335.

[6] Webb *v.* Russell, 3 T. R. 393.

"There is," says Erle, J., "a wide difference between the transfer of the burden of a covenant running with the land and the benefit of the covenant, or, in other words, of the liability to fulfil the covenant, and the right to exact the fulfilment. The benefit will pass with the land to which it is incident; but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between covenantor and covenantee at the time when the covenant is made."[1]

It is not easy to define, in a few words, what is meant in all cases by the expression "privity of estate." But it is apprehended that, in the matter of a covenant running with land, the language of Wilde, J., in Hurd *v.* Curtis, furnishes a sufficient *clew. There, the respective [*16] parties, owning independent estates, entered into certain covenants with each other as to the kinds of wheels they should respectively use in their several mills. The grantee of one of these estates was sued by the covenantee, who had retained his estate, for breaking the covenant as to the use of wheels in the granted estate. "We are of opinion that this action cannot be maintained, as there was no privity of estate between the covenanting parties. Their estates were several, and *there was no grant of any interest in the real estate of either party to which the covenant could be annexed.*"[2] So where one of two adjacent owners of land covenanted with the other, that, if he would erect a party-wall between their estates, the former would pay the latter for one-half of it whenever he should use it, it was held to be a personal covenant, and not to run with the land so as to bind the purchaser of the covenantor's land who should erect a building against the party-wall.[3] But it is not necessary to create the relation of feudal tenure between the covenantor and covenantee, in order that a covenant should run with the land.[4] And a

[1] Cole *v.* Hughes, 54 N. Y. 444. See Burbank *v.* Pillsbury, 48 N. H. 479.

[2] Hurd *v.* Curtis, 19 Pick. 459, 464; Van Rensselaer *v.* Bonesteel, 24 Barb. 365.

[3] Block *v.* Isham, 16 Am. Law Reg. 8; Weld *v.* Nichols, 17 Pick. 543; Cole *v.* Hughes, 54 N. Y. 449.

[4] Van Rensselaer *v.* Read, 26 N. Y. 578.

covenant may run with a rent as with the land itself.[1] Where one granted land to a railroad company for the purposes of their road, and covenanted for himself and his assigns to fence it and keep it fenced, it was held to be a covenant which run with the land, and bound his grantee.[2] So a grant of land with a covenant to keep a drain that drains it in repair runs with the land.[3] And a covenant in a deed of grant, not to build upon the granted premises within so many feet of a street, was held to run with the land.[4] And it was held in New Hampshire that a clause in a deed-poll, reciting that the grantee, his heirs and assigns, agrees to for ever make and maintain a fence around the granted premises, would, if seasonably recorded, bind his assigns, though it was not signed by him.[5] But in Massachusetts such agreement in a deed-poll was held to be a personal obligation only on the grantee's part, and did not bind his assignee, nor constitute a condition in respect to the granted premises.[6] A covenant by one selling land with his grantee not to sell any marl off of adjoining land belonging to him was held not to bind the grantee of such adjacent land, who purchased with notice, as the covenant did not run with the land.[7] A covenant by the owner of a mill privilege, for himself, his heirs and assigns, that no one should be allowed to erect a mill thereon, would not bind the person to whom he should convey the mill privilege. It would bind the covenantor alone; as, when he made it, he conveyed no interest in the land to the covenantee.[8]

It is conceived, in accordance with this idea, that such covenants, and such only, run with land as concern the land itself, in whosesoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee. If one sell land to another, and give him there-

[1] Demarest *v.* Willard, 8 Cow. 206; Willard *v.* Tillman, 2 Hill, 274.

[2] Easter *v.* L. M. Railroad, 14 Ohio St. 51; Trustees, &c. *v.* Cowen, 4 Paige, 510; Barrow *v.* Richard, 8 Paige, 351.

[3] Norfleet *v.* Cromwell, 64 N. C. 1.

[4] Winfield *v.* Henning, 6 C. E. Green, 188.

[5] Burbank *v.* Pillsbury, 48 N. H. 475. [6] Parish *v.* Whitney, 3 Gray, 516

[7] Brewer *v.* Marshall, 4 C. E. Green, 542.

[8] Harsha *v.* Reid, 45 N. Y. 415, 418.

with a covenant for title, he pays just so much more for the land as the covenant enhances the price. And the same would be true with a purchaser from him who, relying upon the covenant, pays him a price enhanced accordingly. And if the title fails, such second purchaser ought to be the one to receive from the covenantor the money originally paid for his agreement to make it good. So if one sell land, and reserve a rent in fee, his vendee pays just as much less for it than he would for a free title as the principal would amount to, whose interest was equal to this rent, and he to whom he sells pays a price accordingly. In either case, the covenant becomes in effect a part of the estate itself; and whoever takes the estate in one case should have the benefit, and in the other should bear the burden. And this, it is believed, covers the decided cases, and applies as well to covenants of title between grantor and grantee as to covenants between lessor and lessee. An example would be a demise of a right to kill game, and a covenant on the part of the lessee to have the estate stocked with game at the end of the term. Such covenant would run with the estate, and might be sued by the assignee of the reversioner.[1] But if one simply covenant with a stranger to build a house, or repair a mill-dam, it is not easy to see how it can be other than a personal covenant, or how it can make any difference in its character in that respect, whether the act is to be done upon the covenantee's land or that of a stranger. * The subject is fully dis- [*17] cussed by Sir Edward Sugden in his treatise on Vendors,[2] and the reader is also referred to the following cases as sustaining the doctrine above stated.[3] It seems that the same

[1] Hooper *v.* Clark, L. R. 2 Q. B. 200.

[2] 2 Sugd. Vend. 6th Am. from 10th Eng. ed. 468–484.

[3] Platt, Cov. 461, 462; 4 Greenl. Cruise, Dig. 571 *et seq.* note; 4 Kent, Com. 472, 473; Lee, Abst. 371; Bally *v.* Wells, 3 Wils. 25, 29, where it is said: "When the thing to be done or omitted to be done concerns the lands or estate, *that* is the medium which creates the privity between the plaintiff and defendant." Taylor *v.* Owen, 2 Blackf. 301; Keppell *v.* Bailey, 2 Mylne & K. 517, 535, 540, 546; Lyon *v.* Parker, 45 Me. 474, directly in point. It may be added, that in carrying out the above rule it must be assumed that the doctrine of Sugden and the New York court is to be adopted rather than that said to be advanced by Lord Holt, as to the liability of the assignee of the grantor of a rent in fee, charged upon the land of the grantor. See Bally *v.* Wells, *sup.*; Morse

effect would be produced if one sells an interest in real estate and takes his pay for it, and covenants for the title, though he has no title, and none actually passes; his covenant would run with the land so as to estop him if he should acquire a title.[1]

17. No assignment, however, can give the assignee a right to recover rent in his own name which had become due before the assignment made, as, upon becoming due, it had become a chose in action, and was not assignable.[2]

18. From the peculiar nature of the property which may be had in fee-farm rents, questions often arise how far these may be subdivided and apportioned, and what effect is to be ascribed to certain acts done by the party claiming the same. Thus there is an entirely different rule applicable to rents service and rents charge, in respect to their apportionment in certain cases. If one having a rent service purchase a part of the land out of which it issues, it extinguishes the rent *pro rata*, and leaves it good for the balance. So if he release a part of his rent, the residue is not discharged.[3] But if it be a rent charge, and the holder of the rent purchases any part of the premises, the rent is wholly extinct. So if he releases any part of the land which is charged, the balance is wholly [*18] discharged, * and the rent will not be apportioned.[4]

But if a part of the lands charged with a rent descend to the grantee of the rent, it being the act of the law and not of the grantee, the rent will not thereby be wholly extinguished, but only *pro rata*.[5] This doctrine is a rule of the common law, that a rent charge being an entire thing, and issuing out of every part of the estate, cannot be apportioned.

v. Aldrich, 19 Pick. 449; Ackroyd *v.* Smith, 10 C. B. 187; Norman *v.* Wells, 17 Wend. 136; Van Rensselaer *v.* Hays, 19 N. Y. 89; Masury *v.* Southworth, 9 Ohio St. 347.

[1] Trull *v.* Eastman, 3 Met. 121, 124.

[2] Burden *v.* Thayer, 3 Met. 76.

[3] 3 Cruise, Dig. 298; Lit. § 222; Tud. Lead. Cas. 196; Ingersoll *v.* Sergeant, 1 Whart. 337.

[4] Lit. § 222; 3 Cruise, Dig. 301; Dennett *v.* Pass, 1 Bing. N. C. 388; Co. Lit. 148; Wms. Real Prop. 276, 18 Vin. Abr. 504; Brooke, Abr. "Apportionment," 17.

[5] 3 Cruise, Dig. 303; Lit. § 224; Tud. Lead. Cas. 197; Wms. Real Prop. 276; Burt. Real Prop. § 1121.

But this rule does not apply where the land charged is divided by operation of law. In such case it will be apportioned. While a rent charge is not apportionable by the act of the parties, it may be done by act of the law. Thus, if the owner die, and the rent descend to several heirs, they are tenants in common, and each may recover, in a several action of covenant, his share of the rent.[1] And where tenants in common of land, charged with a single rent, divided the same, each assuming his share of the rent, and this was done with the assent of the holder of the rent, it was held to be a valid apportionment, exonerating each part from the rent due upon the other part, so that a release of one part was not a discharge of the whole. So if the grantee of a rent charge purchase part of the land, and take an agreement from the grantor that he may distrain on the remaining part for the entire rent, it would be regarded as a new grant, and might be good, though subject to any intermediate incumbrance upon the estate.[2]

On the other hand, a rent charge is susceptible of division, by grant by the holder thereof, without attornment by the tenant of the land; of apportionment, by descent from, or devise by, the holder to several persons, and by levy upon a part of such rent.[3] So the holder may release a part of the rent; but he cannot, as already stated, exonerate a part of the land charged from all rent, without extinguishing the rent altogether.[4] If the tenant of land burdened with a rent charge be evicted of all the land, the rent is extinguished; but if of a part only of the land, the rent will be apportioned.[5]

At common law there was no apportionment of rent in respect to time; so that if it was for life, and the one by whose life it was measured died before the day of payment, it was lost. But in England, by statute 11 Geo. II. c. 19, § 15, a

[1] Cruger *v.* McLaury, 41 N. Y. 223.

[2] Van Rensselaer *v.* Chadwick, 22 N. Y. 33–36. See s. c. 24 Barb. 333; Lit. § 224.

[3] Farley *v.* Craig, 6 Halst. 262; Rivin *v.* Watson, 5 M. & W. 255; 3 Cruise, Dig. 304; Ryerson *v.* Quackenbush, 2 Dutch. 236, 251; Gilbert, Rents, 155, 156; Cook *v.* Brightly, 46 Penn. 440.

[4] Burt. Real Prop. § 1123; Farley *v.* Craig, 6 Halst. 262.

[5] 3 Cruise, Dig. 304; Co. Lit. 148 b; Tud. Lead. Cas. 198.

ratable rent for the time between the last payment and the death of the lessor for life is collectible. And now, by statute 4 & 5 Wm. IV. c. 22, rents service and rents charge, which are determined by the death of a person between rent-days, are collectible *pro rata* upon a like principle of apportionment.[1] And the same rule prevails in most of the States by statutes, following the principle of the statute 11 Geo. II. c. 19.[2]

19. Upon the death without heirs of one seised of a rent charge in fee-simple, the rent does not escheat to the [*19] State, but *simply ceases by extinguishment. And a rent may be extinguished by non-payment for twenty years.[3] *

20. If the owner of the rent purchase the fee of the land out of which it issues, the two will merge unless there is an outstanding mortgage upon the land. If there is, they will not.[4]

* NOTE. — It may be of little practical use to attempt to account for the difference made by the common law in the matter of apportionment between rents service and rents charge. But it seems that the latter, being repugnant to the feudal policy, as not being an incident to *tenure*, were never favored by the common law. It was regarded as an entire and indivisible thing; and therefore if, by purchasing in a part of the land charged, and thereby relieving it from the charge, or by releasing a part of the land in any way by his own act, a part of it was relieved from the burden by the owner of the rent, there was no way of apportioning the rent upon the remainder; and, being no longer collectible in entirety, it was lost altogether. It was otherwise, as has been stated, where a part of the land was relieved by act of the law, when the balance remained charged *pro tanto*. So the holder of the rent might release or discharge a part of the rent, without affecting his right to recover for the balance, since that balance remained still a charge upon the whole land as at first. Wms. Real Prop. 276, 277; Burt. Real Prop. § 1121; Lit. § 222; Co. Lit. 147 b, 148 a.

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[1] Tud. Lead. Cas. 184; Wms. Real Prop. 27.

[2] Hill, Trust. 395, Wharton's note. See Mass. Gen. Stat. c. 90, §§ 24 and 26, as to apportionment of rents, whether in fee, for life, or years.

[3] Tud. Lead. Cas. 199; Owen *v.* De Beauvoir, 16 M. & W. 547.

[4] Cook *v.* Brightly, 46 Penn. 440.

SECTION II.

FRANCHISES.

1. Franchises defined.
2. By whom franchises usually held.
3. What franchises treated of.
4–6. Of ferries.
7. Exclusive enjoyment of ferries.
8. How such franchises are revocable.
9, 10. Of bridges.
11. How far franchises subject to eminent domain.
12. Where franchise implies exclusive right.
13. Franchises subject to proprietor's debts.

1. Another class of what are called Incorporeal Hereditaments is *Franchises*, which are defined to be special privileges conferred by government on individuals, and which do not belong to the citizens of the country generally by common right. In this country, no franchise can be held which is not derived from the law of the State.[1]

2. These privileges are usually granted to and held by corporations, created for the special purpose of exercising them, such as bridge, railroad, or turnpike corporations; and are still called *hereditaments*, although inheritability cannot properly be predicated of property held by corporations, as these can have no heirs.[2] But in an early case in Massachusetts, where a right * of ferry had been enjoyed and exercised [*20] by individuals for more than eighty years, the claimant of the right was permitted to show, by parol, the existence of the ferry, his seisin of it, its continued use, and the exercise of the right to take toll. And the property in the same was held to be a private estate in fee, without being appendant to a corporeal tenement.[3]

3. It is proposed, however, to treat, and that but briefly, of

[1] Bank of Augusta *v.* Earle, 13 Pet. 519, 595; Ang. & Ames, Corp. § 4. In England it is now granted by the legislature, and not by the crown. 1 Cooley, Black. 274, n.

[2] 3 Kent, Com. 459.

[3] Chadwick *v.* Haverhill Bridge, 2 Dane, Abr. 686, 687; Stark *v.* M'Gowen, 1 Nott & McC. 393; Clark v. White, 5 Bush, 353.

only two or three of these franchises, as to do it more fully would involve an extended consideration of the law of corporations, which the nature of the present work will not admit. These are the right of maintaining ferries, bridges, and, incidentally, railroads. The privilege of making a road or maintaining a ferry, and taking tolls for the use thereof, is a franchise; and so is that of constructing and maintaining a railroad. Nor is it necessary that it should be a monopoly in order to its having the character of a franchise. The right of constructing and maintaining a railroad, whether within or without a city, rests upon its being of public benefit; and the exercise of the right to take lands for it is a proper exercise of eminent domain, under a grant of the government of the State.[1] Each of these comes under the definition of a franchise, whether regarded, as in England, as a privilege in the hands of a subject which the king alone formerly could grant,[2] or, as in this country, a privilege or immunity of a public nature which cannot be legally exercised without legislative grant,[3] and which, in the one country or the other, is held to constitute a franchise.[4] Under this definition, also, would be included the right of banking by a company or association, where the authority to act as such is granted by the legislature.[5]

4. Ferries, that is, rights of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by the way of a toll, are, by common law, deemed to be franchises, and could not, in England, be set up without the king's license, and in this country without a grant of the legislature as representing the sovereign power, and do not belong to the riparian proprietors of the soil. Nor does it depend upon the right to or property in the water, on which it is exercised; for the right to the water may belong to one, and that of the ferry to

[1] Bush *v.* Peru Bridge Co., 3 Ind. 21; Milhau *v.* Sharp, 27 N. Y. 619; Beekman *v.* Saratoga, &c. Railroad, 3 Paige, 45; Davis *v.* Mayor, &c., 14 N. Y. 506, 523; Clarke *v.* Rochester, 24 Barb. 481; Bloodgood *v.* Mohawk Railroad, 18 Wend. 9; McRoberts *v.* Washburne, 10 Minn. 27.

[2] 2 Bl. Com. 37; Finch, Law, 164.

[3] The People *v.* Utica Ins. Co., 15 Johns. 358, 387.

[4] Ang. & Ames, Corp. § 737.

[5] The People *v.* Utica Ins. Co., 15 Johns. 358, 379.

another.[1] The right of ferry does not confer or enlarge, take away or impair, the right of general navigation through the same waters. *And though it implies a right to land passengers on either bank, as occasion may require, it does not depend upon the ownership of the soil of the banks of the water.[2] Nor can the owners of the banks set up and maintain ferries.[3] [*21]

5. When the franchise of a ferry is granted to two persons, both must accept it in order to its becoming a valid grant. If granted to more than two, it must be accepted by a major part of the grantees; and when accepted, there are certain obligations mutually assumed between the government and the grantee of the franchise, by which the latter, among other things, undertakes to provide safe and convenient accommodations for the public at all suitable times, a safe boat with convenient ferry-ways, or modes of access to and departure from the same, with a sufficient number of suitable men to take charge of the same. On the other hand, he becomes entitled by his franchise to receive the prescribed compensation, as toll, from the persons making use of the same. And for any failure on his part he is liable to any person who may be injured thereby.[4] In this way, the ferry becomes property, — an incorporeal hereditament, the owner of which, for the public convenience, being obliged by law to perform certain public services, must, as a reasonable equivalent, be protected in his property.[5] A ferry license in Iowa passes, on the death of the licensee, to his representatives as property.[6]

6. The mode of creating, as well as the extent of the powers and duties incident to, the ownership of ferries, is generally regulated in each State by its own legislation. As a general proposition, whoever has a right to a ferry has a right to enjoy

[1] Fay, Petitioner, 15 Pick. 243, 249, 253; Mills *v.* County Commissioners, 3 Scamm. 53; McRoberts *v.* Washburne, 10 Minn. 27.

[2] Fay, Petitioner, 15 Pick. 243, 254; Peter *v.* Kendal, 6 B. & C. 703.

[3] McRoberts *v.* Washburne, 10 Minn. 27; Fall *v.* County Sutter, 21 Cal. 252.

[4] Chadwick *v.* Haverhill Bridge Co., 2 Dane, Abr. 683; 3 Kent, Com. 458; Willoughby *v.* Horridge, 12 C. B. 742, 747; Ferrel *v.* Woodward, 20 Wis. 461.

[5] Chadwick *v.* Haverhill Bridge Co., 2 Dane, Abr. 683. See 13 Am. L. Reg. 513, for an elaborate article upon Ferries. M'Roberts *v.* Washburne, *sup.*

[6] Lippencot *v.* Allendar, 27 Iowa, 460.

it free from any interference therewith by a stranger. Such interference would constitute what is called a nuisance, and might be restrained by an injunction upon the wrong-doer, issued by a court of chancery at the instance of the owner of the ferry. And this would apply, if, after the right to establish one ferry had been granted, another were set up so near it as to take away the travel which properly belonged to the first.[1] But a court would not, in such case, grant an injunction, if the owner of the franchise should neglect his duty in accommodating the public travel.[2]

7. The great difficulty is in drawing the line within which this rule is confined. If there were but one ferry, travel might find it and use it at the distance of miles. But [*22] the grant of *such a ferry would not preclude the establishment of a new one within such reasonable distance as the public convenience requires, though it should have the effect to withdraw some travel from the first. This will be again considered in respect to the erection of two or more toll-bridges which are governed by similar rules of law. In one case Chancellor Kent held that the doctrine excluded "all contiguous and injurious occupation."[3]

8. If the proprietor of the ferry abuse or neglect the franchise, or fail to exercise it so as to meet the reasonable requirements of the public, the government may repeal the grant, and deprive him thereof, upon a judgment in a process of *scire facias* or *quo warranto*, sued out against him, based upon such abuse or neglect. But mere negligence on the part of the proprietor does not destroy the right and property therein.[4] The proprietor, however, may become liable for injuries resulting from such neglect; as where a traveller's horse was injured by a faulty and defective construction of a railing to a slip, over which the horse passed from the boat to the landing-place at the bank of the river, it was held that the com-

[1] 2 Bl. Com. 219; Ogden *v.* Gibbons, 4 Johns. Ch. 150 160; Newburgh Turnpike Co. *v.* Miller, 5 Johns. Ch. 101, 111.

[2] Ferrel *v.* Woodward, 20 Wis. 462.

[3] Ogden *v.* Gibbons, 4 Johns. Ch. 150, 160; Fall *v.* County Sutter, 21 Cal. 252, 253.

[4] Peter *v.* Kendal, 6 B. & C. 703.

pany were liable, although the horse was led and managed at the time by its owner, a passenger on the boat.[1]

9. What has been said of ferries will substantially apply to the case of bridges. The right to construct a bridge across a river or stream of water, where the same is necessary to accommodate the public travel, and to demand toll of persons using the same, is also a franchise to be granted and regulated by acts of legislation.

10. If the charter for constructing such a bridge should contain a restriction as to the distance within which no other bridge shall be erected, the legislature could not constitutionally authorize it to be done. It would be a contract where the consideration on the one side is the rendering a benefit to the public in doing what the franchise authorizes to be done; and, on the other, the advantage to be derived from the exercise of such franchise, * and detracting from the [*23] profit thereof, would be a violation of the obligation of the contract. And the same rule would be applied in respect to any two competing franchises, like ferries, bridges, or railroads.[2]

11. But this does not affect the right to exercise eminent domain over the franchises of existing corporations in the same manner as over any private property. Thus a legislature may authorize a bridge to be erected so as to occupy and destroy a ferry, or a railroad company or a city to appropriate the bridge property of a company, and thereby destroy its franchise; or even may authorize one railroad company to destroy the franchise of another, in constructing its own road under the exercise of this power of eminent domain, provided compensation is at the same time secured to the party thus deprived of the prior franchise.[3] And though the new fran-

[1] Willoughby *v.* Horridge, 12 C. B. 742.

[2] Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1; Newburgh Turnpike Co. *v.* Miller, 5 Johns. Ch. 101; Redf. Railw. 131; Dartmouth College *v.* Woodward, 4 Wheat. 518, 638; Milhau *v.* Sharp, 27 N. Y. 620; People *v.* Sturtevant, 9 N. Y. 273; M'Roberts *v.* Washburne, 10 Minn. 29.

[3] Central Bridge Co. *v.* Lowell, 4 Gray, 474; West River Bridge Co. *v.* Dix, 6 How. 507; White River Turnpike Co. *v.* Vermont Cent. R. R. Co., 21 Vt. 590; Richmond R. R. Co. *v.* Louisa R. R. Co., 13 How. 71, 83; Redf. Railw. 129, 130; Boston Water Power Co. *v.* Boston & Worcester R. R Co., 23 Pick.

chise might diminish somewhat the one already existing, it is competent for the legislature to create it, and authorize it to be enjoyed, provided the injury thereby resulting to the first can be compensated in damages, and provision therefor is properly made; though it will be remarked, that the case where this was applied was where the franchises were of an entirely different nature, — the one being the flowing of lands for mill purposes, the other of maintaining a railroad. It was not the case of the erection of a bridge within the limits of restriction prescribed by the terms of the grant of a prior bridge franchise.[1]

12. But a much more difficult question has been raised, from time to time, as to how far a legislature is, by construction, restricted in granting new franchises, the exercise of which may impair or seriously injure those already existing. It has been contended, and so some courts have held, that [*24] where a corporation, * upon the faith of a grant of a franchise, had gone on and constructed a bridge, for instance, at great cost, with a view of accommodating a line of travel and obtaining reimbursement from the tolls thereby to be received, there was an implied obligation that the same legislative body should not, within the life of this charter, further authorize the erection of a new bridge so near the first as essentially to divert the travel therefrom, and materially impair the value of the franchise. Among the leading cases which have occurred where this question has been raised was that of the Charles River Bridge *v.* Warren Bridge, which was heard first before the Supreme Court of Massachusetts, and afterwards by the Supreme Court of the United States. From the principles established in this and similar cases cited below, the rule upon the subject seems to be, that though such charters are contracts which a legislature may not violate any more than an individual, yet the charter and the contract are to be construed strictly, and nothing is to be taken by im-

360; Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1. Matter of Kerr, 42 Barb. 119; M'Roberts *v.* Washburne, 10 Minn. 28; New York, &c. R. R. *v.* Boston, &c. R. R., 36 Conn. 196, 198.

[1] Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 23 Pick. 360, 399.

plication. If, therefore, in the first grant there were no terms of restriction of power in granting other franchises, or expressly limiting the exercise of this power, the legislature may authorize the erection of a new bridge, though its effect would obviously be to destroy the value of the first, as was the case with the Charles River Bridge.[1]

13. The franchises of corporations authorized to receive tolls are liable to be taken and sold for the debts of the corporation; in which case the purchaser acquires the right of exercising the same for such period of time as will serve to pay the debt for which the same was sold. But this, being a matter of local statute regulation, will not be pursued in detail.[2]

[1] Charles River Bridge Co. *v.* Warren Bridge Co., 7 Pick. 344; s. c. 11 Pet. 420; 2 Greenl. Cruise, Dig. 66, n.; Piscataqua Bridge Co. *v.* New Hampshire Bridge Co., 7 N. H. 59; Richmond R. R. Co. *v.* Louisa R. R. Co., 13 How. 71, 81; Redf Railw. 131; Fall *v.* County Sutter, 21 Cal. 252, 253; Fort Plain Bridge *v.* Smith, 30 N. Y. 61; Mohawk Bridge *v.* Utica R. R., 6 Paige, 554; Oswego Falls Bridge *v.* Fish, 1 Barb. Ch. 547; Bush *v.* Peru Bridge Co., 3 Ind. 21; Mills *v.* St. Clair Co., 8 How. 581; M'Roberts *v.* Washburne, 10 Minn. 28.

[2] Mass. Gen. Stat. c. 68, §§ 25–34.

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* SECTION III.

EASEMENTS.

1. Easements defined.
2. What included as easements.
3. Easements distinguished from *profits à prendre.*
4. Easement implies the existence of two estates.
5. Affirmative and negative easements.
6. Mode of acquiring easements.
7. How gained by user.
8. How gained by express grant.
9–12. Easements passing by implication.
13. Effect of dividing the dominant estate.
13 *a.* What constitute equitable easements.
14. Easement of prospect.
15, 16. Easements implied in grant of houses, &c.
16 *a.* How far easements may be reserved by implication.
17, 18. Easements acquired by prescription.
19. User defines extent of implied grant.
20, 21. What user sufficient to imply a grant.
22. Of support of soil by adjacent land.
23. User when not adverse.
24. User must be by acquiescence.
25. It must be continuous.
26. What must be the condition of the servient estate.
27. Of the requisite length of time of the user.
28. Of easements by custom and prescription.
28 *a.* Prescriptive highways.
29. Effect of death or alienation upon acquiring easements.
30. Of ways, considered as easements.
31. Dominant estate to repair the way.
32. How right of way may be lost.
33. Cannot be surrendered, &c., by parol.
34. What acts amount to a surrender, &c.
35. Of the easements of light and air.
36. American law of easements of light.
37. May always be gained by express grant.
38. Easement of wind for a mill.
39. Of easement of prospect.
40. Of easements in water.
41. Easements to discharge water from mills.
42. Easements of aqueduct.
43. Of keeping watercourses in repair.
44. Of underground watercourses.
45. As to easements in natural and artificial streams.
46. Of easement of support of adjoining land.
47. Of support of adjoining houses.

48. Of party-walls.
49. Of the benefit of the roof, &c., of a house.
50. Easement to carry on offensive trades.
51. Easement of fishery.
52. Easement of having fences maintained.
53. Right to maintain a wharf.
54. Easements by custom and as an individual right.
55. Right and remedies where easements are obstructed.
56. How easements may be destroyed or determined.
57–59. What acts will have this effect.
60, 61. Unity of the two estates extinguishes easements.
62. Of mines and mining rights.
63. Of mining rights in California.

1. A MUCH more common as well as numerous class of incorporeal hereditaments is embraced under the designation of Easements. They answer to the predial servitudes of the civil law, and consist of a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. The parcel to whose ownership the right is attached is called the *dominant*, while that in or over which the right is to be exercised is called the *servient*, estate. And as these rights are not personal, and do not change with the persons who may own the respective estates, it is very common, when treating of easements, to personify the estates as themselves enjoying them or being subject to them.[1]

2. Among the rights and privileges which are embraced under the name of Easements is that of *way*, or the right by the owner of one parcel of land to pass over the land of another; of *water*, or the right of drawing water from, through, or across the servient for the benefit of the dominant estate, or of discharging water from the dominant over or upon the servient estate, and the like; of *light* and *air*, or of having

[1] Termes de la Ley, "Easement;" 3 Kent, Com. 435; Gale & What. Ease. 1; Walk. Am. Law, 265; Tud. Lead. Cas. 107; Wolfe *v.* Frost, 4 Sandf. Ch. 72, 89; Hills *v.* Miller, 3 Paige, Ch. 254; Case of Private Road, 1 Ashm. 417; Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 16 Pick. 522. Though sometimes used as convertible terms, easements are generally understood to be the benefits which one estate enjoys in or over another, while *servitudes* imply the burdens that are imposed upon an estate in favor of another; the dominant enjoying the easement, the servient sustaining the burden. Washburn, Easements, 5.

light or air come uninterruptedly to the dominant over or across the servient estate; and of *support*, of the soil or buildings of the dominant by the adjacent soil or buildings of the servient estate, and of *party-walls*.

3. These easements are strictly incorporeal hereditaments, though imposed upon corporeal property, and consist simply of a right which is in its nature intangible, and incapable of being a subject of livery.[1] They are, therefore, to be [*26] distinguished *from what was called in the early books a *profit à prendre*, which consists of a right to take a part of the soil or produce of land, such as sand, clay, grass, trees, and the like, in which there is a supposable value. Thus, as there is properly no property in water beyond its use, a man may have an easement to enter upon another's land and take water therefrom for the benefit of his own estate. But he may not, as an easement, have a right to go upon another's land to fish in these waters and take fish therefrom, because it is in the nature of a profit out of it.[2] As an illustration of the distinction there is between the grant of land, which is a thing tangible and a subject of livery, and of an easement, which is otherwise, — if A grants to B "a ditch," and it means the land occupied by flowing or stagnant water, it is a grant of the soil and freehold of the parcel thus limited and defined. But if, from the context, it means a privilege of conducting water within a certain space over his land for use elsewhere, it is a mere right or easement of B in A's land.[3] So a grant of the "use and benefit" of a passage-way gives an easement and not the freehold of the soil.[4] But the grant of a parcel of land to be used as a way is a grant of the fee of the land, and not of an easement only.[5]

[1] Orleans Nav. Co. *v.* Mayor, &c., 2 Martin, 228; Inst. Lib. 2, T. 2; Hewlins *v.* Shippam, 5 B. & C. 221.

[2] Wolfe *v.* Frost, 4 Sandf. Ch. 72; Bailey *v.* Appleyard, 3 Nev. & P. 257; Manning *v.* Wasdale, 5 A. & E. 758; Tud. Lead. Cas. 107; Bland *v.* Lipscombe, 30 E. L. & Eq. 189; Race *v.* Ward, Id. 187, 192; Waters *v.* Lilley, 4 Pick. 145; Gateward's case, 6 Rep. 60; Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 16 Pick. 512, 522, though the use of the easement may deprive the owner of the land of the means of using it, as by flowing water upon it for working a mill on the dominant estate.

[3] Reed *v.* Spicer, 27 Cal. 58.

[4] Codman *v.* Evans, 1 Allen, 447.

[5] Coburn *v.* Coxeter, 51 N. H. 166.

4. The definition given above implies, that, for an easement to exist, there must be two estates in regard to which it is predicated, and that it is not affected by any change of ownership of the respective estates, except that they must belong to different persons, for no man can technically be said to have an easement in his own land. And the consequence is, that, if the same person becomes owner in fee-simple of both estates, the easement is extinguished.[1]

5. These easements are divided into affirmative, or those where the servient estate must permit something to be done thereon, as to pass over it or discharge water upon it, and the like; and negative, where the owner of the servient estate is prohibited from doing something otherwise lawful on his estate, because it will affect the dominant estate, as interrupting the light and air from the latter by building on the former, or diverting a natural watercourse in his land, whereby the water is prevented from flowing to an ancient mill, or digging in his own soil, and thereby taking away the support of a house standing upon the dominant estate.[2]

*6. There are certain general principles applicable [*27] to all easements which may be considered before treating of the different kinds in detail. And, first, as to the modes in which they may be acquired, of which there are said to be three; namely, by express grant, implied grant, and prescription.[3] But this is, in effect, merely saying that an easement, being an interest in land, can be created only by grant, the existence of which may be established by production of a deed expressly declaring it; or may be inferred, by construction, from the terms and effect of an existing deed. Or evidence of the grant may be derived from its having been so long enjoyed as to be regarded as proof that a grant was originally made, though no deed is produced which contains it. Even prescription presupposes a grant to have existed.[4] In case of an express grant, the fact of the creation of the easement, as well as its nature and extent, is to be determined

[1] Tud. Lead. Cas. 108; Wolfe *v.* Frost, 4 Sandf. Ch. 71, 89; Gale & What. Ease. 52; Grant *v.* Chase, 17 Mass. 443, 447; Seymour *v.* Lewis, 13 N. J. 450.

[2] Gale & What. Ease. 15; Tud. Lead. Cas. 107.

[3] Tud. Lead. Cas. 108.

[4] Strickler *v.* Todd, 10 S. & R. 63, 69; Sargent *v.* Ballard, 9 Pick. 251, 255.

by the language of the deed, taken in connection with the circumstances existing at the time of making it. An easement may be created or reserved by an implied grant when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle, that, where one grants any thing to another, he thereby grants him the means of enjoying it, whether expressed or not. Thus, if A sells to B a parcel of land surrounded by other lands, and there is no access to the granted premises but over his own, he gives the purchaser a right of way, by implication, over his own land to that which he has granted.[1] *Cuicunque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit.*[2]

7. There is ordinarily much less difficulty in determining the existence and nature of an easement created by an express or implied grant than of one acquired by an alleged user for a length of time sufficient to create what is called a prescription. Here the mode, intent, and duration of the user, as well as the condition of the two estates alleged to be dominant and servient, in respect to title and posses-
[*28] sion, are among the circumstances * to be regarded in determining the question of the character and existence of the easement. And the want of some one of these circumstances may render a concurrence of all the others inoperative to establish the existence of the easement claimed. Thus there may be two distinct estates, and the owner of the one may have claimed and exercised the right of passing over the other for the period of time ordinarily requisite to give a right of way, but would fail thereby to create a presumption of a grant, if the servient estate, during that period or any considerable part of it, had belonged to a minor, or was in possession of a lessee, or one under a disability like a married woman. The law would never presume a grant from the apparent acquiescence of one who could not have made it, or had no right to oppose the user from which it was sought to be inferred.[3]

[1] Pomfret *v.* Ricroft, 1 Saund. 321, 323, note; Darcy *v.* Askwith, Hob. 234 a.

[2] Broom, Max. 362; Collins *v.* Driscol, 34 Conn. 43.

[3] Yard *v.* Ford, 2 Wms. Saund. 175 d, note; Watkins *v.* Peck, 13 N. H. 360, 381; Melvin *v.* Whiting, 13 Pick. 184.

8. To consider these in detail, the creation of an easement by express grant requires a deed. It cannot be done by parol.[1] Thus a right to overflow another's land can only be acquired by deed, or, what is evidence of it, prescription.[2] The grant may be made in connection with that of the dominant estate, or it may be made separately, thereby imposing the easement upon the estate of the grantor, and rendering it to this extent servient to the estate of the grantee.[3] So this may be done by a covenant or agreement contained in a deed of the servient estate as to the mode of using it, in favor of another estate, although the latter do not belong to the grantor of the former, and although the grantee do not sign the deed. An easement may be created in that way in favor of one estate, and a servitude imposed upon the other, without regard to any privity or connection of title or estate in the two parcels or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title to subject one parcel of land to a restriction in its use for the benefit of another, whether that other belong at the time to himself or to third persons, and sufficient language to make that restriction perpetual.[4] So it may be reserved to the estate of the grantor out of that which he has granted to another. Thus, where one, upon conveying land bounded upon a stream of water, reserves an existing mill and water privilege, there is a reservation of a perpetual right to flow so much of the land granted as is necessary for the use of the mill, and has hitherto been enjoyed.[5]

9. Where an easement, like a right of way, has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easements belonging to it, whether mentioned in the deed or not, although not necessary to

[1] Kenyon *v.* Nichols, 1 R. I. 411, 417; Tyler *v.* Bennett, 2 A. & E. 377; Browne, Stat. Frauds, § 232; Foster *v.* Browning, 4 R. I. 47; Hewlins *v.* Shippam, 5 B. & C. 221; Bryan *v.* Whistler, 8 B. & C. 288; Trammell *v.* Trammell, 11 Rich. 474.

[2] Snowden *v.* Wilas, 19 Ind. 13.

[3] Holms *v.* Seller, 3 Lev. 305; Com. Dig. "Chemin," D. 3; Gerrard *v.* Cooke, 2 B. & P. N. R. 109.

[4] Gibert *v.* Peteler, 38 Barb. 488, 514. See Barrow *v.* Richard, 8 Paige, 351; Brouwer *v.* Jones, 23 Barb. 153.

[5] Pettee *v.* Hawes, 13 Pick. 323.

[*29] the enjoyment of the * estate by the grantee.[1] If a right of way be appurtenant to a parcel of land, it would pass with the land to a lessee, though it were by a parol demise of the land.[2] Although a parol grant of a right of way in gross would be of no legal validity except as a revocable license.[3] And if a way is appurtenant to a parcel of land, a part of which is granted to another, the right of way will exist in each of the parts into which the original estate is divided.[4] But though the doctrine is thus generally laid down, it is to be taken with the limitation, that the burden upon the servient estate is not thereby increased beyond the right originally intended to be granted. Thus, if A were to grant a small parcel of land forming a part of a cultivated field to B for the purposes of a yard to his house, and should reserve a way across the same from the highway to his field, he would not be at liberty to sell his field into house-lots, and thereby build up a village, and give to each purchaser a free right of way through B's yard.[5] Where A granted the right of an existing way to another, to be used by him in common with the grantor and his heirs, and such others as he might grant the same privilege to, it was held that he could not grant it to a stranger, who neither owned the land formerly of A, nor land adjoining the passage-way; and, if used to get access to lots lying disconnected with such passage-way, it would be in violation of the right granted to the first grantee.[6]

10. In considering when and what easements will pass under an implied grant, it is generally necessary to have regard to the circumstances of each particular estate granted; for though, as already remarked, a man cannot have an easement in his own land, and ordinarily the union of title and posses-

[1] Kent *v.* Waite, 10 Pick. 138; 2 Rolle, Abr. 60, pl. 1; Underwood *v.* Carney, 1 Cush. 285; Webster *v.* Stevens, 5 Duer, 553.

[2] Skull *v.* Glenister, 16 C. B. N. S. 90. [3] Duinneen *v.* Rich, 22 Wis. 554.

[4] Underwood *v.* Carney, 1 Cush. 285, 290; Watson *v.* Bioren, 1 S. & R. 227; Whitney *v.* Lee, 1 Allen, 198.

[5] Allan *v.* Gomme, 11 A. & E. 759; South Metropolitan Cemetery Co. *v.* Eden, 16 C. B. 42; Henning *v.* Burnet, 8 Exch. 187; Washburn, Easements, 183.

[6] Lewis *v.* Carstairs, 6 Whart. 193.

sion of two estates in one owner extinguishes any prior existing easement in the one for the benefit of the other, there are cases where two estates have been so used in relation to each other, that, if the owner parts with one of them, he impliedly grants or reserves an easement in the one in favor of the other. This would be the case when the mode of using one part of the premises by the owner would, if continued the requisite length of time, have created an easement in the other, if they had belonged to different persons. Thus, suppose A, owning a dwelling-house with windows opening upon his other lands, sells the parcel on which the house stands, it has been held that he grants by implication the right to enjoy light and air by those windows, and would not have a right to erect a house or any other obstruction upon his adjacent land which would essentially impair the use of these. The seller could not, in such a case, derogate from his own grant. Nor could the grantee of such adjoining land have any better right to do this *than the grantor [*30] himself.[1] But the subject is referred to here chiefly for illustration, and will be again resumed. It was, however, held otherwise in New York, where a lessee stopped the lights in a tenement which he had leased to another, without any covenant restricting him in the use of his adjacent land.[2] In Pennsylvania and Massachusetts it is held, that, if the owner of the house and adjacent land convey the two parcels to different persons simultaneously, no easement is constructively created in favor of the dwelling-house ;[3] while in Palmer *v.* Fletcher, above cited, the court were divided upon the question, whether, if the owner of the house grant the adjacent

[1] United States *v.* Appleton, 1 Sumn. 501; Cherry *v.* Stein, 11 Md. 1, 24; Tenant *v.* Goldwin, 2 Ld. Raym. 1089, 1093; Gale & What. Ease. 51, 63; Swansborough *v.* Coventry, 9 Bing. 305, per Tindal. See also p. *62; Palmer *v.* Fletcher, 1 Lev. 122; Gerber *v.* Grabel, 16 Ill. 217, 224; Maynard *v.* Esher, 17 Penn. St. 222, 226; Rosewell *v.* Pryor, 6 Mod. 116. But see *post*, pl. 35.

[2] Myers *v.* Gemmel, 10 Barb. 537, though held otherwise in Rosewell *v.* Pryor, 6 Mod. 116, which is denied by the court of New York to be law.

[3] Maynard *v.* Esher, 17 Penn. St. 222, though held otherwise in Swansborough *v.* Coventry, 9 Bing. 305; Collier *v.* Pierce, 7 Gray, 18; *post*, p. *83. See also Johnson *v.* Jordan, 2 Met. 234. The drain claimed in this case was not necessary to the enjoyment of the parcel granted. But see Pyer *v* Carter, 1 H. & N. 916.

land, there is an implied reservation of an easement of light over the land so granted. But they all agreed, that, if the house was not an ancient one, the grant of it would convey no easement in the adjacent land of a stranger.[1]

11. In the report of the case of Palmer *v.* Fletcher,[2] a case is put, by way of illustration, of a man, who, having three parcels of land, sells the two outer ones, and retains the middle one. He will in such case have a right of way over the granted parcels to the one so reserved, against his own grant, even though, as is there stated, he may have another way as convenient. But it is apprehended that such is not the law now, unless the way is one of strict necessity, and not of mere convenience. Thus if A sell land surrounding other land belonging to him, to which he can have access only over
[*31] * the granted premises, he, by implication, reserves a way over the same, even though conveyed with covenants of warranty. The way in such case becomes a way of necessity.[3] And where a creditor set off a front parcel of the land of his debtor by metes and bounds, and so cut off his access to his back lands, he took the parcel set off subject to the debtor's right to pass over it to gain access to his rear lands.[4] A way of necessity must be one of more than mere convenience; for, if the owner of the land can use another way, he cannot claim a right by implication to pass over the land of another to reach his own,[5] but it would be enough if it would require an unreasonable amount of labor and expense to render the possible way convenient, that is, labor and expense which would be excessive and disproportionate to the value of the land to be accommodated;[6] and a way of necessity can only be raised out of land granted or reserved by the

[1] Palmer *v.* Fletcher, 1 Lev. 122; s. c. 1 Keble, 553. Nor does the doctrine of implied easement of light apply where the owners of the two estates were not the same at the time of the sale. Cherry *v.* Stein, 11 Md. 1, 25. See *post*, p. *62.

[2] Palmer *v.* Fletcher, 1 Lev. 122.

[3] Brigham *v.* Smith, 4 Gray, 297; Pinnington *v.* Galland, 9 Exch. 1; Pomfret *v.* Ricroft, 1 Wms. Saund, 323, n. 6; Collins *v.* Prentice, 15 Conn. 39; Pierce *v.* Selleck, 18 Conn. 328; Seymour *v.* Lewis, 13 N. J. 444.

[4] Pernam *v.* Wead, 2 Mass. 203; Taylor *v.* Townsend, 8 Mass. 411.

[5] Screven *v.* Gregorie, 8 Rich. 158.

[6] Pettingill *v.* Porter, 8 Allen, 1.

grantor, but not out of the land of a stranger. For, if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own.[1] It may be remarked in this connection, that, if one has a right of way by necessity over the land of another, it is lost when the necessity ceases; so that, if he afterwards acquires a new way to the estate previously reached by the way of necessity, the first is thereby extinguished.[2]

11 *a*. If one grant a lot of land which is laid down upon a plan, and bounds it by an alley which is also laid down upon the plan, it will carry with it a right of way over this alley, as appurtenant to the lot, if it belong to the grantor. Nor would it be lost by mere non-user. So, if it be bounded by a street, it *per se* dedicates the street to the use of the purchaser, although it be not a public one.[3] In New York, bounding by a street does not give the grantee a right to insist that it shall be kept open by the grantor, if it never has been laid out and accepted by the proper authorities.[4] But in Maine it is held that the grantee has a right to have it kept open for his reasonable use as a way.[5]

12. The easements which pass by implication in the grant of premises, under the head of Easements by Necessity, are such as are requisite to the proper enjoyment of the granted estate. Thus if A sells land to B, reserving the trees growing thereon, he thereby reserves a right to enter upon the granted premises, and cut and carry them away, and may give this right to another.[6] So where one sells lands, reserving the mines and a right to sink and open new mines of coal

[1] Pomfret *v.* Ricroft, 1 Wms. Saund. 323, n. 6; Kimball *v.* Cocheco R. R. Co., 7 Fost. (N. H.) 448; Washburn, Easements, 162. The French law is otherwise. Code Nap. § 682.

[2] Holmes *v.* Goring, 2 Bing. 76, 83; N. Y. Life Ins. Co. *v.* Milnor, 1 Barb. Ch. 353, 363; Pierce *v.* Selleck, *sup.*; Washburn, Easements, 165; Abbott *v.* Stewartstown, 47 N. H. 230.

[3] Wiggins *v.* McCleary, 49 N. Y. 346, 348; Cox *v.* James, 45 N. Y. 562; Howe *v.* Alger, 4 Allen, 206; Wash. Ease. 3d ed. 221, 241.

[4] Fonda *v.* Borst, 2 Abb. N. Y. Decis. 155.

[5] Warren *v.* Blake, 54 Me. 281.

[6] Liford's case, 11 Rep. 52; Darcy *v.* Askwith, Hob. 234.

therein, he thereby reserves by implication a right to do whatever is necessary to carry this into effect, such as [*32] fixing and maintaining machinery *for the purpose, and laying a railroad across the land upon which to draw the coal.[1] But where two houses, the usual access to which from the street was along in front of the first to the second, were owned by one person, and he devised the second to A. B., and the first to J. S., and there was a way of access to the second from the street without passing over land in front of the first, it was held that the way which had been used by the devisor did not pass with the second house, inasmuch as it was not necessary to its enjoyment.[2] So where the owner of two estates, one of which he leased, and from which over the other estate he suffered a drain to be used by his tenant for ten years, and then sold both estates at the same time to different purchasers, saying nothing of the drain, it was held, the right to use it did not pass to the owner of the parcel, if he could drain his land in any other way.[3]

13. How far an easement belonging to a dominant estate will pass with the separate parts into which this may be divided by the owner in making sale of the estate in distinct parcels, was considered in the case of Hills *v.* Miller,[4] where it was held that a predial servitude or easement is a charge upon the servient tenement, and follows it into the hands of any one to whom such estate or any part of it is conveyed. And as it is annexed to the estate for the benefit of which the servitude is created, the right is not destroyed by a division of such tenement. The owner or assignee of any part of it may claim the right, so far as it is applicable to his part of the property, provided it can be enjoyed by the several estates without increasing the burden or charge upon the servient estates. In the case in which this was applied, the grantor sold a parcel of land opening upon another lot, which the grantor covenanted should remain open for purposes of

[1] Dand *v.* Kingscote, 6 M. & W. 174, 195.

[2] Pheysey *v.* Vicary, 16 M. & W. 484.

[3] Johnson *v.* Jordan, 2 Met. 234.

[4] Hills *v.* Miller, 3 Paige, Ch. 254. See also Rankin *v.* Huskisson, 4 Sim. 13; Watson *v.* Bioren, 1 S. & R. 227; Underwood *v.* Carney, 1 Cush. 285. Case of Private Road, 1 Ashm. 417; Whitney *v.* Lee, 1 Allen, 198.

light, &c. The grantee sold a part of his estate to the plaintiff; and then, the original grantor *having sold [*33] the open lot to the defendant, the latter began to build upon it. Upon a bill in equity by the plaintiff to restrain him, an injunction was granted.

´13 *a*. From this recognized power on the part of the owner of an estate to impress upon parts of his estate the rights and liabilities in respect to each other which courts of equity treat as of the nature of easements, a class of what may be called *equitable easements* have grown out of covenants and agreements made by such owners in respect to the modes in which the parts of such estates should be used in reference to each other, which easements become mutually appurtenant to these parts respectively. Among the cases in which this class of easements have been considered are those cited below, where, in respect to the mode of building upon or occupying parts of a once common estate, certain stipulations were made by the owners, or in the deeds of the same, as to the use of ways, light, and air, &c., to be enjoyed in connection with these estates; and in one of which the court say: "A covenant, though in gross, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege; or, as it is sometimes called, a 'right to an amenity' in the use of an adjoining parcel, by which his own estate may be enhanced in value, or rendered more agreeable as a place of residence."[1] Such covenants run with the land, and bind assignees; and a party injured may have a remedy in equity.[2]

14. This subject suggests an important inquiry, how and to what extent the owner of an estate can, when conveying it in separate and distinct parcels to different persons, create servitudes or easements upon one in favor of another of these

[1] Parker *v.* Nightingale, 6 Allen, 341; Hubbell *v.* Warren, 8 Allen, 173; Wolfe *v.* Frost, 4 Sandf. Ch. 72; Tallmadge *v.* E. River Bank, 26 N. Y. 105; Greene *v.* Creighton, 7 R. I. 1; Whatman *v.* Gibson, 9 Sim. 196; Washburn, Easements, 3d ed. 97–106.

[2] Winfield *v.* Henning, 6 C. E. Green, 188; Clark *v.* Martin, 49 Penn. St. 290; St. Andrew's Church Appeal, 67 Penn. St. 518; Harrison *v.* Good, L. R 11 Eq. 338; Brewer *v.* Marshall, 4 C. E. Green, 543.

parcels. The matter is thus presented by the court in Whitney *v.* Union R. Co.: "Cases have arisen where the owner of a large tract of land, for the purpose of providing an area in front of it, to be kept for ever open, for securing its permanent use and enjoyment for dwellings, and excluding all offensive and noxious trades from the premises, has inserted covenants and conditions in his grants restricting the use of the land conveyed so as to effect these objects. It has been held in such cases, that each grantee of a part of the land subject to such restrictions is bound to observe the stipulations in favor of other grantees of a part of the same land, and is entitled to claim a like observance in his favor as against them." And the court further say: "In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding on the original parties only, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or easement appurtenant to the remaining land belonging to the grantor at the time of the grant, and arising out of and attached to the land, part of the original parcel conveyed to the grantee. When, therefore, it appears, by a fair interpretation of the words of the grant, that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted for the benefit of the other land owned by the grantor, and originally forming with the land conveyed one parcel, such right shall be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective parcels of lands."[1] From the doctrine of a more recent [*34] case, however,[2] * these propositions are to be confined to cases where the covenant or agreement on the part of the original grantee with the grantor expressly related to and was for the benefit of the covenantee as owner of another parcel of estate at the time of the grant, and had relation to such estate, and it was so made that the owner of the granted estate, if not himself the covenantor, had notice thereof when

[1] Whitney *v.* Union R. Co., 11 Gray, 359; Clark *v.* Martin, 49 Penn. 298.

[2] Badger *v.* Boardman, 16 Gray, 559.

he became the purchaser. And this restriction, by way of condition, in the manner of using an estate granted, cannot be availed of by the owners of other estates, unless the condition be made in reference to the estate being divided into parcels, to be owned by different persons, and to be beneficial to such individual owners, or it was made to benefit some other adjacent tract, or one in the vicinity. If this is not so, the condition would only enure to the grantor and his heirs, and they only could take advantage of it.[1] In one case, A owned two estates adjoining each other, upon one of which was a dwelling-house having a projecting part in the rear, one story in height. He sold the latter subject to the restriction "that no outbuilding or shed, &c., shall ever be erected, &c., of a greater height than those standing thereon." Subsequent to this, A sold to the plaintiff his other and adjoining estate. The purchaser of the first estate proposed to raise the projecting part of the house another story, and thereupon the plaintiff brought a bill in equity against the latter to restrain him from thus raising the building on his estate. The original vendor had in the mean time, after his sale to the plaintiff, released the restriction to the first purchaser. The court held that the bill could not be maintained, inasmuch as there was nothing in the deed which showed that the restriction as to building was intended to enure to the benefit of the estate now owned by the plaintiff, nor did the words of the restriction indicate the object of the grantor in inserting it in the deed. And the grantee, therefore, had no notice that the restriction was intended for the benefit of the plaintiff's estate.[2] Among the cases illustrative of the foregoing doctrine is the one already mentioned; namely: A vendee of a parcel of village land took from his vendor a bond, which was recorded with his deed, whereby his vendor bound himself, &c., that a certain other parcel belonging to him, adjoining that conveyed, should for ever be kept open, and not built upon. The vendee then sold to one H. a part of the first parcel, at the same time informing him of the agreement as to the other parcel. After this, the representative of the first party gave

[1] Jewell *v.* Lee, 14 Allen, 149, 150; Dana *v.* Wentworth, 111 Mass. 293.

[2] Badger *v.* Boardman, *sup.*

license to a third party to build upon this other parcel; and H. applied for an injunction, which was decreed, on the ground that the right thus granted, of having the [*35] other parcel kept open, was a servitude * upon the latter in favor of the former, and that the owner of the servient estate might be enjoined from making any erection on it which might injure the light or prospect of the dominant tenant; that rights of this description are attached to the estate, and not to the person of the owner of the dominant tenement; and they follow that estate into the hands of the assignee thereof, and follow the servient estate as a charge into the hands of any person to whom the same or any part thereof is subsequently conveyed.[1] A case perhaps more directly in point was one where the owner of a block of ground in the city of New York divided the same into thirty-nine building-lots, and recorded a copy of the map thereof in the registry of deeds. He then sold five of these lots to four different persons in severalty. In each of the deeds a condition was inserted, declaring the conveyance void if there should be erected, &c., on any part of the premises conveyed, any livery-stable, slaughter-house, &c. (enumerating several kinds of trades "offensive to the neighboring inhabitants"). He afterwards sold more than twenty other of the lots, containing a mutual covenant between grantor and grantee of a similar effect as to restricting these trades, but not in the form of a condition. One B. purchased No. 11, and R., subsequently to that, purchased No. 12, which were a part of the last twenty lots. R. erected works on No. 12 alleged to be offensive, and B. brought a bill to restrain his using it for that purpose. The court held that these covenants run with the land, are binding upon all who succeed to it, but do not attach to any other parcel so as to run in favor of the purchaser thereof as assignee of the covenantee. But it was held that a court of chancery might protect a previous purchaser by injunction against the acts of a subsequent one, who had entered into such a covenant for the mutual benefit and protection of all the purchasers in the block.[2] It may be remarked, that though an

[1] Hills *v.* Miller, 3 Paige, Ch. 254, 256; Clark *v.* Martin, 49 Penn. 298.

[2] Barrow *v.* Richard, 8 Paige, Ch. 351. See also Trustees of Watertown *v.*

easement of prospect, as it is called, over another's land, may * be created by an express grant or covenant, it cannot be gained by an implied grant or prescription.[1] [*36]

15. In another case, the owner of a parcel of land erected several houses thereon adjoining each other in such a manner as to require the mutual support of each other, and then sold one of these with the land on which it stood. It was held that the right of having it supported by the adjacent houses passed with it as an easement, while a corresponding right of having the remaining house or houses adjoining it supported upon that was reserved to such other house or houses. Nor does the right depend, in such a case, upon any priority of titles in the respective owners, where the original owner has parted with his title to the same.[2] In one case, it was assumed that the owner of a tenement may so grant an easement in it as to create an easement over the tenement of the grantee in favor of his own tenement, by a provision to that effect in the grantor's deed. Thus where A had a close (No. 2) lying between two closes (Nos. 1 and 3) belonging to B, and A granted to B a right to construct and maintain a drain from No. 1 across No. 2 to No. 3, and through that to its outlet, and A, in his grant to B, reserved the right to enter his drain for the benefit of No. 2, with the privilege of having the waste water therefrom pass through No. 3 for ever, — this, it was assumed, secured the grantor a right in the grantee's land by the way of an implied grant or covenant, though not strictly a reservation.[3]

16. It is stated as a general proposition, that if there be a severance of a heritage into two or more parts, in respect to which there had been continuous and apparent easements used

Cowen, 4 Paige, Ch. 510, 515; 3 Sugd. Vend. 401; Bedford *v.* British Museum, 2 Mylne & K. 552; Gibert *v.* Peteler, 38 Barb. 513; Easter *v.* L. M. Railroad, 14 Ohio St. 54.

[1] Attorney-Gen. *v.* Doughty, 2 Ves. 453; Squire *v.* Campbell, 1 Mylne & C. 459; Aldred's case, 9 Rep. 58 b; Parker *v.* Foote, 19 Wend. 309, 316, holds it not to be the subject of grant.

[2] Richards *v.* Rose, 9 Exch. 218; Webster *v.* Stevens, 5 Duer, 553; Eno *v.* Del Vecchio, 6 Duer, 17.

[3] Dyer *v.* Sanford, 9 Met. 395, 405, per Shaw, C. J.

by the owner, such an easement would pass by implication with the dominant estate, although technically it could not have been enjoyed as an easement by the owner of the entire estate.[1] Thus where one owned two adjoining houses [*37] which * had drains communicating with each other, in use, and he sold one of these without mentioning the drain, it was held that the grantee took his estate with the existing right of using the drain connected with the other, and subject to the easement of the drain of the other estate, by an implied grant and reservation.[2] So where two houses had had the use of an alley between them, and in this state came to the hands of one proprietor in fee, whose interest was afterwards conveyed by a sheriff's sale to two separate persons as distinct parcels, it was held that the right of way through this alley revived in favor of each of the tenements.[3] And where the owner of two parcels has used one of them in such a manner as requires a partial use of the other, as in case of water-rights, and such a use is necessary to the enjoyment of the parcel for the benefit of which the other has been thus used, and the parcels come into the hands of different owners, they would, in some cases, take them as if there was an existing easement which the one had in the other by a grant and reservation of the estate with the appurtenances, although a man cannot have an easement in his own land.[4] Thus, if a man lay pipes for a conduit from one part of his land to his house, situated upon another part, and sell the house with its appurtenances, reserving the land, or the land, reserving the house, the right to maintain the conduit will pass or be reserved as an easement appurtenant to the house, if it is necessary to the enjoyment of the same.[5] So where the owner of a mill, the race-way from which was an artificial trench running along the bank of the natural stream, sold the mill and land on which it stood by metes and bounds, not including the land through which this race-way had been excavated, it

[1] Kenyon *v.* Nichols, 1 R. I. 411, 417.

[2] Nicholas *v.* Chamberlain, Cro. Jac. 121; Pyer *v.* Carter, 40 E. L. & Eq. 410; s. c. 1 H. & N. 916. See Johnson *v.* Jordan, 2 Met. 234, 240.

[3] Kieffer *v.* Imhoff, 26 Penn. St. 438.

[4] Brakely *v.* Sharp, 1 Stockt. 9, 14; McTavish *v.* Carroll, 7 Md. 352.

[5] Nicholas *v.* Chamberlain, Cro. Jac. 121; Guy *v.* Brown, 5 Moore, 644.

was held that the right to make use of this passed, by implication, by the deed of the land on which the mill was standing.[1]

But, it is apprehended, whether the right to such an easement * passes in such cases or not depends upon [*38] whether it is necessary to the enjoyment of the estate granted or reserved. Thus in the case of Brakely *v.* Sharp, above cited,[2] the owner of the land had laid an aqueduct to two houses on his estate, an upper and a lower one, first passing to the upper house and then to the lower one, through his own estate. The upper one was set off to the widow and one of his heirs; the other was then sold by commissioners upon the estate to a third person. And it was held that the right to the aqueduct did not pass with the lower house, because it was not necessary for its enjoyment; though, had it been, this right would have passed with it.[3]

In another case, the effect of dividing a heritage into two or more parts, upon the character and use of rights which would have been easements, if the several parts had been occupied by different owners, came to be considered. The estate was a swamp used for the cultivation of rice, and had been provided with artificial channels for controlling the water and conducting it off the premises, which premises were subsequently divided, and became the separate estates of distinct owners. It was held that in the severance of such a heritage there was an implied grant of all such continuous and apparent easements which had been used by the owner of the entire estate, as well as of all easements, without which the enjoyment of the several portions could not be fully had.[4] The cases thus far referred to, it will be observed, have been chiefly those where the easements in question have been created or reserved, expressly or by implication, by deed. The effect of dividing a heritage in creating easements or servitudes is so fruitful a topic of inquiry in its practical appli-

[1] New Ipswich Factory *v.* Batchelder, 3 N. H. 190.

[2] Brakely *v.* Sharp, 1 Stockt. 9, 14; s. c. 2 Stockt. 206.

[3] Palmer *v.* Fletcher, 1 Keble, 553; Johnson *v.* Jordan, 2 Met. 234; Archer *v.* Bennett, 1 Lev. 131; Sury *v.* Pigot, Poph. 166.

[4] Elliott *v.* Rhett, 5 Rich. Law, 405, 415.

cation, that it seems to call for a still further illustration. It contemplates the adaptation by the owner of two heritages, or of two or more parts of the same heritage, of a use in or over one part for the benefit and enjoyment of the other, of what would, if in the hands of different owners, constitute an easement in favor of the one estate, and a servitude upon the other. Besides this, it requires that the ease or benefit which one part derives from or enjoys in or over the other should be apparent and continuous; such, for instance, as an aqueduct from a spring on the one part, supplying water for the use of the other. This adaptation of the several parts of one or more estates by the same owner in reference to the advantageous occupation of the same is called in the French law *destination du père de famille*, and would have the same effect if the owner were to convey one of these parts, and retain the other in creating an easement or servitude in favor of or upon the part so conveyed, as if it were expressly declared in writing to exist.[1] The only limitation perhaps which should be added, in order to apply this doctrine to the English and American law, is, that what is thus claimed as an easement must be reasonably necessary to the enjoyment of that to which it is sought to make it appendant.[2] Among the numerous cases which might be cited to confirm the above doctrine is one where the owner of a tract of land through which a stream of water flowed diverted it by a new channel, leaving that part through which it had flowed dry, and fit for building-purposes. In this state he sold this part; and subsequently the purchaser of the other part stopped the artificial trench upon his own land, and restored the stream to its ancient bed. It was held, that by so doing he violated the rights of the first purchaser. The rule is thus stated: "Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it

[1] Pardessus, Traité des Servitudes, 430, 431; Code Nap. art. 642; La. Civ. Code, art. 763; Seymour *v.* Lewis, 13 N. J. 443.

[2] French *v.* Carhart, 1 Comst. 104; Washburn, Easements, 53, 54, 529; Johnson *v.* Jordan, 2 Met. 242.

and the property which the vendor retains."[1] In another, the owner of a mill also owned a spring of water on another lot, and constructed an artificial conduit from the spring to his mill-pond to help supply it with water. He then sold the spring lot, making no mention of the spring; and it was held that the right to the water from the same became, by such severance of ownership, appurtenant to his mill. So that it seems that the two tenements need not be parcels of one estate, or that the two estates need not be adjacent to each other.[2]

16 *a*. It would be difficult, if not impossible, to reconcile the English cases with themselves, or with the American cases, upon the subject of easements being created in favor of one parcel, in or over another parcel of what once formed one heritage, upon a division thereof being made by a conveyance of one or both parts thereof by the owner. The difficulty has chiefly arisen in cases where the easement is claimed by the grantor, by the way of implied reservation out of the part that is granted, and may be illustrated by the case of a drain serving two houses by passing from the one through the other into a common sewer. If the owner grant the upper one, and make no restriction, there seems to be little, if any, dispute that he would by so doing grant the right of such drain as an easement belonging to the upper house; but if he grant the lower one, the rulings of the courts differ greatly as to such right being reserved by implication in favor of the upper house. The chief difference seems to be this: If a drain in such case is necessary, the leading English cases hold that the law would imply such a reservation, although a new drain for the upper house might be supplied over the grantor's other land at an inconsiderable expense.[3] Whereas by the Massachusetts cases, while they concede that if the drain is necessary, and cannot be supplied otherwise by any reasonable expense, the right of easement would be reserved by impli-

[1] Lampman *v.* Milks, 21 N. Y. 505, 507. See Dunklee *v.* Wilton R. R. Co., 4 Foster (N. H.), 489.

[2] Seymour *v.* Lewis, 19 N. J. 439.

[3] Pyer *v.* Carter, 1 H. & Norm. 916, which is impugned by Suffield *v.* Brown, 10 Jur. N. S. 111, but sustained in Ewart *v.* Cockrane, 4 McQueen, 117, cited in 1 H. & Colt. 681, 685, and in several other cases; Wash. Ease. 3d ed. 65–72.

cation, they hold there would not exist such a necessity if it could be replaced or supplied elsewhere by a reasonable outlay of expense.[1] Though both classes of cases would probably agree, that if, as in one of the Massachusetts cases, the drain was unknown to both parties, any right to it could not be reserved to the grantor, unless the easement is one strictly of necessity.[2]

17. A much more numerous and difficult class of cases arises in the application of the doctrine of easements by prescription,[3] or by a user for such a length of time as to raise the presumption of an original grant. The subject [*39] involves the length of * time the use has been enjoyed, the mode and extent in which it has been applied, and how far there has been an acquiescence on the part of the owner of the estate which is adversely affected by such a user. Originally, the time required for gaining a right by prescription began from some point anterior to the memory of man. And this was at one time fixed at the commencement of the reign of Richard I. But as it was always open to be rebutted by proof that the use did begin within the period of memory, the courts, to avoid this, and to sustain privileges which had long been enjoyed, adopted the notion of presuming an ancient grant by deed which had been lost from a period of enjoyment, the length of which was in some measure governed by the term of limitation adopted as a bar to the claim of land itself, till it became a settled principle of the common law, that such an enjoyment for the term of twenty years raises a legal presumption that the right was originally acquired by title.[4] * The court of New York, in commenting upon rights

* NOTE. — Each State, therefore, may have its own period of prescription or presumed grant. In Connecticut it is fifteen years, in analogy to its statute

[1] Johnson *v.* Jordan, 2 Met. 234; Thayer *v.* Payne, 2 Cush. 327; Randall *v.* McLaughlin, 10 Allen, 366; Carbrey *v.* Willis, 7 Allen, 369. See McCarty *v.* Kitchenman, 47 Penn. 243; Warren *v.* Blake, 54 Me. 289, adopting Carbrey *v.* Willis, &c., as the rule of law.

[2] Carbrey *v.* Willis, *sup.* See Washburn, Easements, 66–70.

[3] Prescription properly applies only to incorporeal hereditaments, and not to lands. Ferris *v.* Brown, 3 Barb. 105. For prescription or *usu capion* (*usu rem capere*) by the civil law, see Me. Anc. L. 284; Wood, Civ. Law, 123; Washburn, Easements, 65. See also Phillips, Jurisprudence, § 147.

[4] 1 Report Eng. Com. 51; 1 Greenl. Ev. § 17; Campbell *v.* Wilson, 3 East,

gained by enjoyment, say: "The modern doctrine of presuming a right, by grant or otherwise, to easements and incorporeal hereditaments, after twenty years of uninterrupted, adverse enjoyment, exerts a much wider influence in quieting possession than the old doctrine of title by prescription, which depended upon immemorial usage. The period of twenty years has been adopted by the courts in analogy to the statute limiting an entry into lands; but as the statute does not apply to incorporeal rights, the adverse use is not regarded a legal bar, *but only a ground for presuming [*40] a right either by grant or in some other form." The occupation in such cases is not conclusive, but it is evidence which is open to be rebutted by evidence upon the other side.[1]

18. There is a class of cases, chiefly those of the enjoyment of the adverse use of water, where the courts have been inclined to treat a continued adverse enjoyment as something more than *evidence* of a grant or title, and to regard it as a conclusive presumption of title. Thus, in Bealey *v.* Shaw,[2] Ellenborough, C. J., says: "I take it that twenty years' exclusive enjoyment of the water in any particular manner affords *conclusive* presumption of right in the party so enjoying it." And Story, J., in Tyler *v.* Wilkinson,[3] says: "By our law, upon principles of public convenience, the term of twenty years of exclusive, uninterrupted enjoyment has been

of limitations. Sherwood *v.* Burr, 4 Day, 244, 249. Pennsylvania, twenty-one years. Strickler *v.* Todd, 10 S. & R. 63, 69. Massachusetts, twenty years. Sargent *v.* Ballard, 9 Pick. 251, 254.

294, 301; Coolidge *v.* Learned, 8 Pick. 503, 508; Ricard *v.* Williams, 7 Wheat. 59, 110; Sherwood *v.* Burr, 4 Day, 244, 249; Bright *v.* Walker, 1 C. M. & R. 217. Best, Presumpt. 103; Hoy *v.* Sterrett, 2 Watts, 327, 330. Even though the jury should not have found that any deed had ever been in fact made. Sargent *v.* Ballard, 9 Pick. 251, 255.

[1] Parker *v.* Foote, 19 Wend. 309; Curtis *v.* Keesler, 14 Barb. 511; Doe *v.* Reed, 5 B. & Ald. 232; Sherwood *v.* Burr, 4 Day, 244, 250; Tinkham *v.* Arnold, 3 Me. 120, 123; Holcroft *v.* Heel, 1 B. & P. 400, and Williams' comment on that case, Wms. Saund. 175 a, note; Best, Presumpt. 103 and note, Am. ed.; 3 Dane, Abr. 55, who treats this presumption of grant from twenty years' enjoyment as a modern doctrine of doubtful validity.

[2] Bealey *v.* Shaw, 6 East, 208, 215.

[3] Tyler *v.* Wilkinson, 4 Mason, 397, 402.

held a conclusive presumption of a grant or right." "The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law." And Vice-Chancellor Leach, in Wright *v.* Howard,[1] says: "Which term of twenty years is now adopted upon a principle of general convenience as affording conclusive presumption of a grant." [2] On the other hand, this enjoyment has been held to be only evidence of a grant open to any controlling evidence as to the mode and circumstances under which it has been held; and it would seem that the principle of its being a conclusive presumption must, if ever correct, be limited to the adverse use of water.

[*41] And even if so limited, it would seem to be open to the criticism * of the editor of Best on Presumptions (p. 103), who, in referring to the expression of Lord Ellenborough above cited, that it is "a conclusive presumption," remarks that it would be "an expression almost as inaccurate as calling the *evidence* a *bar;*" "whereas the clear meaning of the cases is, the jury ought to make the presumption, and act definitively upon it, unless it is encountered by adverse proof." [3] Whatever discrepancy there may be between the language of the different cases, it will probably be found to have arisen from the courts not making a distinction between the ancient doctrine of prescription, which was from its very nature conclusive, as it went back beyond the period of evidence, and the modern doctrine of prescription, which is another name for presumption, and which, like all legal

[1] Wright *v.* Howard, 1 Sim. & S. 190, 203.

[2] Strickler *v.* Todd, 10 S. & R. 63, 69; Sherwood *v.* Burr, 4 Day, 244, 250; 1 Greenl. Ev. § 17; Garrett *v.* Jackson, 20 Penn. St. 331; Sargent *v.* Ballard, 9 Pick. 251, 255, by Putnam, J.

[3] Best, Presumpt. § 88; Bright *v.* Walker, 1 C. M. & R. 217; 3 Stark. Ev. 3d ed. 911; Wms. Saund. 175 c, n.; Lamb *v.* Crosland, 4 Rich. 356, 543, where it is said Judge Story did not make the proper distinction between a proper prescription and a presumption of a non-existing grant, the latter of which arises after twenty years' enjoyment; the former goes beyond legal memory. And Gray, J., says: "The dicta of Mr. Justice Story, if fairly susceptible of a wider interpretation than this (that a prescription cannot be interrupted by a disability which does not come into existence until after the time has begun to run), are in conflict with the general current of authority, and can hardly be reconciled with the opinion of the Supreme Court of the United States, as delivered by the same learned judge." Edson *v.* Munsell, 10 Allen, 566.

presumptions of evidence, is subject to be negatived or controlled by other evidence.[1]

The propriety of this criticism will more clearly appear when the effect of even slight circumstances in controlling the inferences to be drawn from mere length of enjoyment comes to be considered. And many questions which it had been somewhat difficult to decide, between the ancient doctrine of prescription and the modern one of presumed grant, have been settled in England by the statutes 3 & 4 William IV. c. 71, fixing a time of prescription in certain cases, and prescribing what shall be required to be proved to establish the rights to such easements as water, light, and the like.[2]

19. While, in the case of an easement created by grant, the language made use of by the parties limits and defines their respective rights, in the case of prescription the only way of determining these rights is by referring to user or mode and extent of enjoyment of what is claimed for the requisite period of time. Thus there are, as will be seen hereafter, a variety of kinds of *way* known to the law; and whether a man has acquired a footway, a horseway, or a carriage-way, by prescription, would depend upon the evidence of the mode in which he may have enjoyed it, and it may in fact have been used for so many purposes as to justify a jury in finding that the easement is a general right embracing all these.[3] So where a fence along a highway has stood for twenty years, it is to be taken as the true limit and boundary of the way, unless controlled by positive testimony, or records, or monuments.[4]

*20. As user thus becomes so important in deter- [*42]
mining questions of prescriptive right, the law has been careful in defining the circumstances which must concur in connection with the actual enjoyment of any of these privileges, called easements, to give them the legal character and

[1] Washburn, Easements, 66 *et seq.* and cases cited.

[2] Bright *v.* Walker, 1 C. M. & R. 217; 1 Greenl. Ev. § 17, n. 1; Tud. Lead. Cas. 114. In Massachusetts, rights to light and air cannot be acquired by prescription. Mass. Gen. Stat. c. 90, §§ 32, 33.

[3] Cowling *v.* Higginson, 4 M. & W. 245; Brunton *v.* Hall, 1 Gale & D. 205, 210, and note; s. c. 1 A. & E. N. S. 792.

[4] Pettingill *v.* Porter, 3 Allen, 349.

incidents of an easement. To give a user this effect it must be uninterrupted in the land of another, by the acquiescence of the owner, for a period of at least twenty years (or the period of limitation of the State where the land lies), under an adverse claim of right; while all persons concerned in the estate, in or out of which it is derived, are free from disability to resist it, and are seised of the same in fee and in possession during the requisite period. Where all these circumstances concur, it raises a *prima facie* evidence of a right to such easement acquired by a grant which is now lost; though, in regard to the easement of light, some of these propositions may have to be somewhat modified, especially as to the adverse character of the enjoyment.[1]

Many of the cases make use of the term "adverse enjoyment," which is substantially the same as its being enjoyed under a claim of right against the owner of the land out of which the easement is derived. And all the cases concur in the doctrine, that the right must be exercised adversely to that of the land-owner, since no length of enjoyment by his permission, and under a recognition of his right to grant or withhold it at his pleasure, will ripen into an easement. Thus one owning two adjoining parcels of land permitted another to occupy one of the parcels under an expectation that he would purchase it, and also to make use of a well upon the other parcel; and this continued ten years, when the owner sold the parcel having the well upon it to a third party. The occupant of the other parcel having acquired a title to the same, continued to use the well for more than another ten years, when he was forbidden to use it; and it was held that he had not acquired a right so to do by adverse enjoyment.[2] In order to gain an easement by prescription, there must be an adverse enjoyment of what is claimed during all the requi-

[1] Bract. Lib. 2, c. 23, § 1; Smith *v.* Bennett, 1 Jones (N. C.), 372; Colvin *v.* Burnet, 17 Wend. 546; Pierre *v.* Fernald, 26 Me. 440; Sargent *v.* Ballard, 9 Pick. 251, 255; French *v.* Marstin, 4 Fost. (N. H.) 440; Okeson *v.* Patterson, 29 Penn. St. 22; Parker *v.* Foote, 19 Wend. 309; Hart *v.* Vose, 19 Wend. 365; Luce *v.* Carley, 24 Wend. 451; Mebane *v.* Patrick, 1 Jones (N. C.), 23; Pierce *v.* Selleck, 18 Conn. 331. See further, as to acquiring an easement of light and air by adverse enjoyment, *post*, *60.

[2] Stevens *v.* Dennett, 51 N. H. 324.

site time; and this must be so notorious, that the owner of the servient estate may be presumed to have knowledge of its being adverse.[1] The inference of a grant, if raised at all, is derived from a claim on the one side, and a yielding on the other, of that which can properly be created only by grant. Where two adjacent owners built a party-wall between their estates, resting it upon an arch, one leg of which stood upon the land of one owner, and the other upon that of the other, and the archway was used by them as a common passage-way, it was held to be such an adverse user by each of the other's land as to give him a prescriptive right to have the wall thus supported.[2] Thus, in Miller *v.* Garlock,[3] an uninterrupted enjoyment of a way across another's lands for twenty years, unexplained, was presumed to be under the claim and assertion of a right adverse to the owner, not only giving title by prescription, but raising a presumption of a grant. And in Bowen * *v.* Team[4] the court say: "The owner of [*43] the soil by prescription, which is another name for adverse possession, held for twenty years of an easement, is supposed to grant a way, &c."[5] It is no objection to the acquiring of an easement by adverse enjoyment that it began by permission, if claimed adversely during the requisite period as a matter of right. Thus where the grantee of a piece of land, on receiving his deed, agreed with the grantor that he, the grantor, might continue to use a way across it as he had been accustomed to do, it was held that he might show this, after enjoying the way for twenty years, as evidence that he did it under a claim of right.[6]

21. To constitute such an adverse enjoyment as will give a party an easement in another's land, it must be had while

[1] Morse *v.* Williams, 62 Me. 445. [2] Dowling *v.* Hennings, 20 Md. 184.

[3] Miller *v.* Garlock, 8 Barb. 153.

[4] Bowen *v.* Team, 6 Rich. L. 298, 302; Townsend *v.* McDonald, 2 Kern. 381, 391.

[5] Warren *v.* Jacksonville, 15 Ill. 236; Pue *v.* Pue, 4 Md. Ch. Dec. 386; Hoy *v.* Sterrett, 2 Watts, 327, 330; Garrett *v.* Jackson, 20 Penn. St. 331; Onley *v.* Gardiner, 4 M. & W. 496, 500; Tickle *v.* Brown, 4 A. & E. 369; Monmouthshire Canal Co. *v.* Harford, 1 C. M. & R. 631.

[6] Ashley *v.* Ashley, 4 Gray, 197; Arbuckle *v.* Ward, 29 Vt. 43.

there is some one to whom such use is adverse.[1] It must, moreover, be open, and such as the owner is presumed to be cognizant of. If stealthily done, it would not give a right.[2] But it is no objection that the user began in trespass.[3] And it has been held that mere passing across open unenclosed land would not gain a right of way, without something to show that by so doing a right to such use was asserted;[4] though, in some cases, the use of a way across even wild lands has been held to give an easement therein.[5] This would probably depend upon the nature of the use, and how far it indicated that it was done in the exercise of a claim of right. The enjoyment of the *natural* flow of water through the land of the owner of the soil is not deemed adverse so as to give him a technical easement therein; and the same would be true of light and air in connection with lands or tenements, if there had not grown up, by the common law of England, a right to prevent another from interrupting their [*44] * enjoyment in connection with a dwelling-house, shop, and the like, after the ordinary period of prescription, as will be hereafter explained.[6]

22. Upon somewhat the same principle that applies in respect to acquiring an easement of light and air, the owner of the soil has a right to support the same against that of an adjacent owner, so that the latter may not dig so near to the line of his land as to cause the soil of the former to fall into the excavation thus made, provided the owner of such soil has not done any thing to increase the weight to be sustained. He has not, as will be seen, a right to make use of the land of the adjacent owner to sustain buildings which he may erect on his own land.[7]

[1] Hoy *v.* Sterrett, 2 Watts, 327; Hurlbut *v.* Leonard, Brayt. 201; Manning *v.* Smith, 6 Conn. 289; Felton *v.* Simpson, 11 Ired. 84.

[2] Onley *v.* Gardiner, 4 M. & W. 500; Tickle *v.* Brown, 4 A. & E. 369.

[3] Sibley *v.* Ellis, 11 Gray, 417.

[4] Watt *v.* Trapp, 2 Rich. 136; Gibson *v.* Durham, 3 Rich. 85.

[5] Reimer *v.* Stuber, 20 Penn. St. 458.

[6] Sury *v.* Pigot, Poph. 166; Tud. Lead. Cas. 104, 105; Moore *v.* Rawson, 3 B. & C. 332; Parker *v.* Foote, 19 Wend. 309; Cross *v.* Lewis, 2 B. & C. 689, 690.

[7] Wyatt *v.* Harrison, 3 B. & Ad. 871; Napier *v.* Bulwinkle, 5 Rich. 324. See *post*, pl. 46.

23. Where one was accustomed to turn his cattle upon his own land to depasture the same, between which and a beach there was no fence, and they were in the habit of going on to this beach to feed, there was held not to be such an adverse enjoyment of the right as to give him an easement to feed his cattle upon the beach.[1] And one test, whether an easement may have been gained by an enjoyment which is adverse or not, is, whether it is injurious to the right of others. If it is not, it will not ordinarily lay a foundation for a prescription; though, as hereafter shown, this is not always true.[2] Nor will such enjoyment be adverse, in the sense of the law, unless it is with the knowledge of the owner of the estate in which it is sought to claim an easement.[3]

If, therefore, it can be shown that the enjoyment of the right or privilege claimed, during any part of the time in which it was said to have been gained by user, was by permission of the * owner of the land, the idea of its [*45] being adverse, and as of right, and therefore an easement, is negatived.[4] Thus where A, by permission of B, constructed a drain from B's land through his own to a river, and this remained so for twenty years, when A closed it up upon his land, it was held that B had gained no prescriptive right to maintain the drain, as the user had not been adverse.[5] And an admission to this effect, after the expiration of the twenty years, may operate to defeat a claim of its being an easement.[6] So an offer, during the alleged period of prescription, by the owner of the dominant tenement, to purchase the right of the servient one, would rebut the presumption of an easement gained by twenty years' enjoyment.[7]

Another illustration of the principle that one may not, by

[1] Donnell *v.* Clark, 19 Me. 174.

[2] Donnell *v.* Clark, 19 Me. 174; Wheatley *v.* Baugh, 25 Penn. St. 528.

[3] Daniel *v.* North, 11 East, 370; Hogg *v.* Gill, 1 McMull. 329; Nash *v.* Peden, 1 Speers, 17; Hoy *v.* Sterrett, 2 Watts, 330; Washburn, Easements, 111

[4] Flora *v.* Carbeau, 38 N. Y. 111.

[5] Smith *v.* Miller, 11 Gray, 148.

[6] Bright *v.* Walker, 1 C. M. & R. 211, 219; Sargent *v.* Ballard, 9 Pick. 251, 255; Church *v.* Burghardt, 8 Pick. 327; Beasley *v.* Clarke, 2 Bing. N. C. 706; Tickle *v.* Brown, 4 A. & E. 369; Monmouthshire Canal Co. *v.* Harford, 1 C. M & R. 614, per Lord Lyndhurst; Onley *v.* Gardiner, 4 M. & W. 500.

[7] Watkins *v.* Peck, 13 N. H. 360.

enjoyment of a privilege, acquire a right to claim it as an easement, or maintain an action for being deprived of it, if it has not been adverse, is found in the case of one owning land upon a stream, the waters of which had been so regulated and controlled by a dam and mill above, belonging to another, as to prevent their overflowing this land for more than twenty years. After this, the mill-owner removed his dam, and the waters in the stream thereupon, at times, flowed over and damaged the land as they had formerly done. It was held, that, as the enjoyment of this protection to the land had been in no sense adverse to the proprietorship of the mill and dam, it created no easement to have the water controlled by them, and the land-owner was without remedy for the injury he sustained by their removal.[1]

24. In addition to the use being adverse on the part of the dominant estate to create an easement, it should have been enjoyed by the acquiescence of the owner of the servient estate, he knowing of such use and not objecting thereto, *per patientiam veri domini qui scivit et non prohibuit, sed permisit de concessu tacito.*[2] Thus where the owner of land, while upon the same, forbade an adjacent owner of land from [*46] entering upon *his land and doing acts of repair to an aqueduct which the latter had laid in the land of the former, it was held to be evidence to rebut any supposed acquiescence, by which the one who had used the aqueduct might have acquired a right of easement by the use of the same.[3]

25. In the next place, the enjoyment must be continuous and uninterrupted for the requisite term of time. Of course this must be according to the nature of the easement, as there must obviously be a different degree of continuity in ever so frequent use of a mere passage-way, and that of flowing another's land, or enjoying light and air over vacant land of another. Besides, the mere ceasing to use an easement, where

[1] Felton *v.* Simpson, 11 Ired. 84.

[2] Bract. Lib. 2, c. 23, § 1; Sargent *v.* Ballard, 9 Pick. 251, 254; Colvin *v.* Burnet, 17 Wend. 564; Pierre *v.* Fernald, 26 Me. 440.

[3] Powell *v.* Bagg, 8 Gray, 441; Washburn, Easements, 112; Eaton *v.* Swansea Waterworks Co., 17 A. & E. N. S. 267, 269.

there is no opposition to its enjoyment, is something different from what is meant by an interruption of its enjoyment.[1] Nor would a mere change in the form of the estate, in which it is claimed that an easement has been gained, be an interruption in the meaning of the law. As where a man had used the waters of a stream for more than twenty years, but, during that period, the owner of the land above had changed the direction of the water through the same, it was held to be no interruption of the enjoyment or the right.[2] So it is not necessary that one, to gain an easement of water, should have used it precisely in the same manner, or for driving the same machinery during the requisite time, a change in this respect not being an interruption of his enjoyment.[3] Nor would it affect his right that he had changed the diameter of his wheel, provided he did not thereby use more water than was necessary to carry the original wheel.[4] So where there was a grant of a right of * way for the purpose of carrying [*47] coals, and, after using a common driftway, the grantee substituted a *tram* wagon-way, which had been found to be more convenient, it was held, that he did not thereby impair his right of way.[5] But where the easement claimed is acquired, if at all, by user, any essential change in the mode or extent of the user will prevent the acquisition of the easement, if, after such change, the user shall not have been continued for the term of twenty years. Thus, where a town had enjoyed a drain to discharge water upon another's land for less than twenty years, and then deepened and enlarged it, and varied its course, but continued to use it, it was held, that

[1] Gale & What. Ease. 87; Onley *v.* Gardiner, 4 M. & W. 500; Bright *v.* Walker, 1 C. M. & R. 211, 219; Garrett *v.* Jackson, 20 Penn. St. 331; Sargent *v.* Ballard, 9 Pick. 251, 255; Co. Lit. 113 b; Bracton, fol. 51, 52; Wood *v.* Kelley, 30 Me. 47; Carr *v.* Foster, 3 A. & E. N. S. 581; Carlisle *v.* Cooper, 4 C. E. Green, 256.

[2] Hall *v.* Swift, 4 Bing. N. C. 381; s. c. 6 Scott, 167; Bullen *v.* Runnels, 2 N. H. 255.

[3] Belknap *v.* Trimble, 3 Paige, Ch. 605; Luttrel's case, 4 Rep. 87, a case of changing a fulling-mill into a corn-mill, for the use of which the right of water was claimed by prescription.

[4] Saunders *v.* Newman, 1 B. & Ald. 258; Whittier *v.* Cocheco Mg. Co. 9 N. H. 454.

[5] Senhouse *v.* Christian, 1 T. R. 560.

such change interrupted the use, and prevented their thereby acquiring the easement of the drain, short of twenty years' enjoyment of it as it then was. And the same principle was applied to the case of a drain from a cellar into the same town drain, where the owner of the cellar altered his drain so as to enter it into the town drain after it had been altered.[1]

Where one made use of a way for the term of one year, and then suspended the use of it for five years, when he renewed it again, it was held not to have been continuous so as to establish a prescriptive right to its enjoyment.[2] So, where one who owned a mill and mill-yard laid boards upon an adjoining lot of land for twenty-four years in succession, except an interval of five years, during which he did not use the privilege, it was held not to be a continuous use for the time requisite to acquire an easement.[3] So where, to an action of trespass *quare clausum fregit*, the defendant prescribed for a right of way by forty years' enjoyment next before the suit brought, and failed to show an enjoyment of it during four or five years before the bringing of the action, it was held, that this proof was defective in establishing an uninterrupted enjoyment within the English statute of prescription.[4] But there is no way at common law, as understood and applied in the English courts, of preventing, by [*48] interruption, the acquisition of an * easement of light, except by the creation of some obstruction thereto by the owner of the land over which it is enjoyed.[5]

26. Another circumstance essential to acquiring an easement in land is, that the land, during the time of the easement being acquired, should be in the possession and occupation of some one as the owner of the inheritance, who is not under any disability to resist the use, and who may be presumed to have made a grant of such easement from his having been, at the time, of capacity to make it. If, therefore, the servient estate, during a part or all of the time, belongs to a minor, an insane person, or *feme covert* married before

[1] Cotton *v.* Pocasset Mg. Co., 13 Met. 429. [2] Watt *v.* Trapp, 2 Rich. 136.
[3] Pollard *v.* Barnes, 2 Cush. 191.
[4] Parker *v.* Mitchell, 11 A. & E. 788; Stats. 2 & 3 Wm. IV. c. 71.
[5] Cross *v.* Lewis, 2 B. & C. 686.

the user began, it would prevent the easement being acquired.[1] But the rule is different in different States, where the servient estate comes into the hands of a minor heir after the adverse user has been begun. In some States, such a circumstance suspends the prescription until the minor shall have arrived at age.[2] In others, the courts hold the operation of prescription to be like that of the statute of limitations; and where it has begun to run against the ancestor, it will not be arrested by his death, although his heir be an infant.[3] Those who hold the former doctrine go upon the ground, that, as prescription is but an evidence of a grant, it does not arise unless there has been some one, during the entire period requisite, who owned and was competent to convey a title to his estate; which would not be true of an infant. But it does not admit of one assuming this disability, like becoming covert after it has begun to run, and setting it up as a bar to a prescription. Thus, if, while the use of that which is claimed as an easement is being had, the land in which it is claimed is in possession of a tenant, it would not give such right of easement against the reversioner.[4] Nor would the one using the privilege gain an easement against the tenant himself, since the former by using the easement cannot get a title to the same against the owner of the inheritance, and no presumed grant from the lessee will be raised by the user.[5] On the

[1] Bradbury *v.* Grinsell, 2 Wms. Saund. 175 d, n.; Melvin *v.* Whiting, 13 Pick. 184, 188; Lamb *v.* Crosland, 4 Rich. 536; Watkins *v.* Peck, 13 N. H. 360; Reimer *v.* Stuber, 20 Penn. St. 458; Barker *v.* Richardson, 4 B. & Ald. 579; Edson *v.* Munsell, 10 Allen, 557.

[2] Melvin *v.* Whiting, *sup.*; Lamb *v.* Crosland, *sup.*; Watkins *v.* Peck, *sup. semble.*

[3] Tracy *v.* Atherton, 36 Vt. 503; Mebane *v.* Patrick, 1 Jones (N. C.), 26; Reimer *v.* Stuber, 20 Penn. 463; Wallace *v.* Fletcher, 10 Foster, 434, 454, where it is denied that Watkins *v.* Peck maintains a contrary doctrine Wash. Easements, 159–163; *post*, *79.

[4] Bradbury *v.* Grinsell, 2 Wms. Saund. 175 d, n.; Pierre *v.* Fernald, 26 Me. 440; Daniel *v.* North, 11 East, 370; Sargent *v.* Ballard, 9 Pick. 241; Barker *v.* Richardson, 4 B. & Ald. 579; Washburn, Easements, 114.

[5] Bright *v.* Walker, 1 C. M. & R. 211. This would seem to rest upon the Stat. of 2 & 3 Wm. IV. c. 71. In this case the court say they do not intend to say any thing to prevent the operation of an actual grant by one lessee to another, nor prevent the jury from taking the possession into consideration, with other circumstances, as evidence of a grant which they may still find to have been made.

other hand, an easement enjoyed by a widow in another's land in respect to her dower lands ceases upon the determination of her estate.[1]

27. In respect to the length of time during which there must be an uninterrupted adverse user and enjoyment by the owner of one parcel of land of what he claims as an easement in that of another, in order to establish such claim, it may be stated as a general proposition, that it is commensurate with the time within which, by the local law, the right of making an entry into lands, or bringing ejectment for [*49] the same, is limited. In England, * and most of the States, this period is twenty years.[2] In Pennsylvania, the period of presumption of a grant is twenty-one years.[3] But the rule is a general one, that an enjoyment of what is claimed as an easement for any time less than the prescribed period of limitation of the place is not even *prima facie* evidence of a grant of such easement, and gives no right to the same.[4] And fixing the time or event from which the computation of the term of enjoyment is to be made, it would seem to be that at which the enjoyment became complete; as where the question was in relation to flowing of lands by a mill-dam, it was held, that the period from which such computation was to be made was when the dam was in a suitable condition to stop the water, and not when the structure was commenced.[5] And the extent of the right thereby acquired was limited by the height to which the flowing had been maintained

[1] Hoffman *v.* Savage, 15 Mass. 130.

[2] Gale *v.* What. Ease. 94; Daniel *v.* North, 11 East, 370; Parker *v.* Foote, 19 Wend. 309; Bradbury *v.* Grinsell, 2 Saund. 175 a; Hogg *v.* Gill, 1 McMull. 329; Nash *v.* Peden, 1 Speers, 17; Manier *v.* Myers, 4 B. Mon. 514; Melvin *v.* Whiting, 13 Pick. 184; Hazard *v.* Robinson, 3 Mason, 272; Corning *v.* Gould, 16 Wend. 531, 534; Tyler *v.* Wilkinson, 4 Mason, 397; Sargent *v.* Ballard, 9 Pick. 251; Gayetty *v.* Bethune, 14 Mass. 49. In Borden *v.* Vincent, 24 Pick, 301, this term was held sufficient, although the dam claimed for the benefit of the mill had been also used as a public highway across a navigable stream. Esling *v.* Williams, 10 Penn. St. 126; McCready *v.* Thomson, Dudl. (S. C.) 131; Watkins *v.* Peck, 13 N. H. 360; 1 Greenl. Ev. § 17; Carlisle *v.* Cooper, 4 C. E. Green, 262.

[3] Okeson *v.* Patterson, 29 Penn. St. 22.

[4] Green *v.* Chelsea, 24 Pick. 71, 79; Luther *v.* Winnisimmet Co., 9 Cush. 171; Carlisle *v.* Cooper, *sup.*

[5] Branch *v.* Doane, 17 Conn. 402.

during the requisite period of time.[1] And the maintenance of the dam at a uniform height would fix the extent of the right to flow, although a part of the time during the twenty years, by reason of leaking or want of repair, the dam may not have kept up the water to its original height in the pond.[2]

28. It may be remarked, that although the inhabitants of a particular village or locality may acquire a right to an easement, such as a way across a parcel of land, by *custom*, yet the *public* cannot gain an easement by *prescription*, inasmuch as that implies a grant, and the public cannot be made a grantee.[3] But it is no objection to a person claiming a right of way — for instance, by prescription as appurtenant to his particular estate — that other persons have a right to use the same way by custom * or grant, since different per- [*50] sons may claim the same way by different rights.[4]

28 *a*. Highways may be established by prescription by showing an adverse use for twenty years. But such a use, or a dedication accepted by the town, or a laying-out, must be shown to make the town liable for damages arising in such a way. But using a way opened by the owner of land by the public, though continued for twenty years, is not of itself such a dedication as to make it a highway for which the town would be responsible.[5]

29. In computing the twenty years of enjoyment, it is not essential that the easement should have been used during the whole time by the same person, provided there was a privity of estate in those who have enjoyed it. Thus, if an ancestor die before enjoying an easement for twenty years, and his heir continue to use it for the balance of the time, it will be sufficient. So where the use is continuous by the seller and purchaser successively of the dominant estate for the requisite

[1] Wood *v.* Kelly, 30 Me. 47; Cowell *v.* Thayer, 5 Met. 253; Ray *v.* Fletcher, 12 Cush. 200; Vickerie *v.* Buswell, 13 Me. 289.

[2] Jackson *v.* Harrington, 2 Allen, 243; Cowell *v.* Thayer, *sup.*; Carlisle *v.* Cooper, 4 C. E. Green, 256.

[3] Curtis *v.* Keesler, 14 Barb. 511; 1 Steph. Com. 4th ed. 683; Merwin *v.* Wheeler, 23 Am. L. Reg. 601.

[4] Kent *v.* Waite, 10 Pick. 138, 142; Barnstable *v.* Thacher, 3 Met. 243, case of picking cranberries.

[5] Mayberry *v.* Standish, 56 Maine, 342. See, for the doctrine of dedication, *post*, *459. Wash. Easements, pp. 4, 185–197, 3d ed.

period of time ;[1] and in this the civil and common law coincide.[2] Nor would the death of the owner of the servient estate during the period of prescription defeat or prevent the gaining of an easement by a user for the requisite length of time, provided the heir of such owner were, at the time of his death, of age. But if he were a minor, such minority would in some States arrest and suspend the effect of the prescription so long as the same continued ; and the prescription could only become complete by the adverse enjoyment being continued after his arriving at age, — long enough to have the period anterior to the death of the ancestor, and that subsequent to the heir's arriving at age, together equal to the period of prescription.[3] But a disability assumed by the heir after the ancestor's death, such as becoming a married woman, or a disability arising to one against whom a prescription has begun to run, such as the owner of the land becoming insane, does not suspend or arrest the maturing of a title by adverse possession.[4]

30. Before proceeding to consider how easements may be used, or lost and extinguished, which comes properly under the head of general rules by which such interests are governed, it is proposed to treat of these easements somewhat in detail. And first as to WAYS. Rights of way of necessity seem to be limited to such as come strictly within what is implied by the term. It is not sufficient that the way may be more convenient than another. And where one who had enjoyed a way to his own land across the land of another, as being one of necessity, afterwards acquired access to the same land over his own estate, the way of necessity was held thereby to be defeated and at an end.[5] And a way by neces-

[1] Melvin *v.* Whiting, 13 Pick. 184, 188; 3 Kent, Com. 444; Sargent *v.* Ballard, 9 Pick. 251, 256.

[2] Ayliff, 324.

[3] Washburn, Easements, 116–118; Lamb *v.* Crosland, 4 Rich. L. 536; Watkins *v.* Peck, 13 N. H. 360; Melvin *v.* Whiting, 13 Pick. 184, 188; Code Nap. art. 2252; Arbuckle *v.* Ward, 29 Vt. 43.

[4] Currier *v.* Gale, 3 Allen, 328; Allis *v.* Moore, 2 Allen, 306; Mebane *v.* Patrick, 1 Jones (N. C.), 23.

[5] Holmes *v.* Goring, 2 Bing. 83; Anderson *v.* Buchanan, 8 Ind. 182; Washburn, Easements, 165.

sity can never arise except by grant, either express or by implication, from its being essential to the enjoyment of something that is expressly granted.[1] Such a way is always appurtenant to the estate as long as the necessity lasts.[2] The right of locating or designating a way of necessity is, in *the first place, in the owner of the land over [*51] which it is to pass; and all that one, having such right of way, can claim, is, that the way be convenient, and he is bound to exercise the right so as to occasion the least possible injury or inconvenience to the owner of the land. The owner of the easement may select the place of the way if the other party refuse to do so.[3] And the same doctrine applies in locating an aqueduct. But when once located, the grantee has no right to change it.[4]

Ways are of several different kinds, according to the uses to which they are applied. And as a way given for one special purpose may not be used for another, and what the character of a way in any particular case is generally depends upon the use to which it has been applied, the law is strict in requiring the owner of such an easement to confine himself within the limits of his express or implied grant; and whether he does so or not is a question for the jury. If one who has a way for one purpose make use of it for another, he thereby becomes a trespasser as much as if he had no easement at all in the land.[5] Thus a footway cannot be used as a horseway.[6] Nor does a carriage-way acquired by use necessarily give a party a right to use it as a driftway for cattle.[7] And where one had a way over B's land, to carry off the farming produce of his land, he was held to have no right to carry lime from

[1] Proctor *v.* Hodgson, 29 E. L. & Eq. 453; Brakely *v.* Sharp, 1 Stockt. 12, 13, and note; Bullard *v.* Harrison, 4 M. & S. 387; Nichols *v.* Luce, 24 Pick. 102; Gayetty *v.* Bethune, 14 Mass. 49; M'Donald *v.* Lindall, 3 Rawle, 492; Tracy *v.* Atherton, 36 Vt. 503.

[2] Dennis *v.* Wilson, 107 Mass. 591.

[3] Russell *v.* Jackson, 2 Pick. 574, 578; Holmes *v.* Seeley, 19 Wend. 507; 2 Rolle, Abr. 60; Smiles *v.* Hastings, 24 Barb. 44.

[4] Jennison *v.* Walker, 11 Gray, 426.

[5] Cowling *v.* Higginson, 4 M. & W. 245; Tud. Lead. Cas. 123; Ballard *v.* Dyson, 1 Taunt. 279; Higham *v.* Rabett, 5 Bing. N. C. 622.

[6] Kirkham *v.* Sharp, 1 Whart. 323.

[7] Ballard *v.* Dyson, 1 Taunt. 279; Allan *v.* Gomme, 11 A. & E. 759.

his land over the same way, though burned upon his land.[1] So where, to an action of trespass for carrying water and goods across a party's land, the defendant relied upon a right of way, and the jury found that he had a way for carrying water, and not for carrying goods, the defendant was held liable in the action.[2] So where a lessor reserved a right of way over the land leased to and from a stable which belonged to him, "on foot, and for horses, oxen, cattle, and sheep," and he undertook to carry manure from the stable [*52] across the land in a wheelbarrow, and *the tenant obstructed him, for which he brought an action, it was held that he could not recover, since the way reserved did not include a right to carry away manure in a wheelbarrow; and though while so doing he was passing on foot within the terms of the reservation, yet as in doing so he was using the wheelbarrow, which he had no right to do, the tenant was justified in obstructing his passage.[3] If one grant a free and unobstructed way, it is for the jury to determine whether maintaining a gate across it by the owner of the land is an unreasonable obstruction. It is not of itself such, and the acts of the parties immediately after the grant may be taken as an exposition of it.[4]

And this strictness is especially adopted in respect to the extent to which a party may use a way, where he uses no other mode of passing over it than he had a right to. Cases of this kind have chiefly arisen where, under a right to pass over another's land to accommodate a particular house, or stable, or lot of land, a man has undertaken to use it in connection with, and for the accommodation of, other premises. Thus where A, as the owner of a two-acre mowing-lot, had a right of way across B's land, appurtenant to said lot, for the purpose of bringing away the hay growing thereon, and purchased another lot adjoining the first, the hay from which, mixed with that on his two-acre lot, he carried across B's land, it was held that he was thereby a trespasser, since the

[1] Jackson *v* Stacey, Holt, N. P. 455; French *v.* Marstin, 4 Fost. (N. H.) 440.
[2] Knight *v.* Moore, 3 Bing. N. C. 3; Higham *v.* Rabett, 5 Bing. N. C. 622.
[3] Brunton *v.* Hall, 1 Gale & D. 207; Washburn, Easements, 185, 186.
[4] Connery *v.* Brooke, 73 Penn. St. 84.

use must be confined to the two acres.[1] So where one had a right to drive his cattle across the land of another to a lot to depasture, and having done so drove them from the first lot into another, he thereby became a trespasser.[2]

But a right of way between two termini will not be inconsistent with the exercise of the right over a part of the same if it crosses a highway, and the owner of the way has been accustomed, as occasion required, to pass between one of the termini and the highway. He may, in such case, pass over the servient estate toward the other terminus as far as the highway, and then, instead of going on to that terminus, may follow the highway in any direction and to any distance he may choose.[3]

And while the court will, in case of an express grant of a * way, give to the grantee all that is necessary to [*53] enjoy what is granted, they will confine the limits of the grant to the terms adopted by the parties. Thus where A granted to B a right of way "over and along" a certain strip of land, with power to make causeways, to use carts, wagons, &c., "to carry coals," it was held, that, while B might lay down a new and different form of way which had been invented since the making of the deed, and which was better fitted than any other for the purpose, he could not make transverse tracks, though convenient for his use, but must limit himself to one direct track.[4]

But the owner of the dominant estate must not change the use of his easement, so as to produce inconvenience to the servient estate, or increase the burden thereon beyond that which would be necessarily created by carrying out the grant.[5] Nor can the grantee of a right of way change its

[1] Davenport *v.* Lamson, 21 Pick. 72; Howell *v.* King, 1 Mod. 190. But see Williams *v.* James, L. R. 2 C. B. 580.

[2] 1 Rolle, Abr. 391, pl. 3; Woolr. Ways, 34; Colchester *v.* Roberts, 4 M. & W. 769; Lawton *v.* Ward, 1 Ld. Raym. 75; French *v.* Marstin, 32 N. H. 316.

[3] Colchester *v.* Roberts, 4 M. & W. 769.

[4] Senhouse *v.* Christian, 1 T. R. 560; Russell *v.* Jackson, 2 Pick. 574, 577; Comstock *v.* Van Deusen, 5 Pick. 163, that a grant of a way *across* a parcel of land will not justify entering upon and going partly across, and coming out at another point on the same side at which he entered.

[5] Garritt *v.* Sharp, 3 A. & E. 325; Gerrard *v.* Cooke, 2 B. & P. N. R. 115.

direction from that described in the grant.[1] Nor would one having a right of way to a lot over a servient parcel have a right to pass along the boundary-line of the servient parcel after reaching the lot to which the way led.[2] Thus where there was a grant of a house, stable, and piece of land, with a right of way belonging to the same, and the way then used led to the house and stable, and then to the field around a certain point to a certain gate, the grantee took down the house and stable and built a wall across the former way, and, instead of it, opened a new gate into the field at a different point, it was held to be an act of trespass to pass over this new way into the field; for though a right of way was granted, it was limited to the one then existing.[3] But where a grantor of a messuage reserved "*a* right to pass over the yard," he had no right of action against his grantee for stopping the way then in use, the grantee having opened a new and convenient one, because the reservation was undefined in its terms. Nor did it make any difference in this respect that the grantor had made use of the way existing when he made the reservation for more than twenty years after his [*54] * grant, since such use was not adverse by reason of its being exercised by the authority reserved in the deed, and the reservation might be as well answered by the one way as the other. And if in such case the owner of the granted land were to stop the way in use, the grantor, under his reservation, might pass over any other part of the estate least prejudicial to the owner thereof.[4]

If one who has an easement for one purpose, such as a footway for instance, use it for another, as for carriages, it will not give a right to the owner of the servient estate to stop the use altogether, so as to deprive the former of his footway, for the rightful use in such case may be separated from that which is wrongful.[5] But if the owner of the dominant estate extend his easement in another's land beyond what he has a

[1] Northam *v.* Hurley, 1 E. & B. 665; Gore *v.* Fitch, 54 Me. 41.
[2] Brossart *v.* Corlet, 27 Iowa, 288.
[3] Henning *v.* Burnet, 8 Exch. 187.
[4] Atkins *v.* Bordman, 2 Met. 457; Farnum *v.* Platt, 8 Pick. 339.
[5] Gale & What. Ease. 362; Tud. Lead. Cas. 132.

right to enjoy, and does it in such a way that the owner of the servient estate cannot stop the excessive use without stopping the use altogether, the latter may lawfully do so.[1] But whether a change in the mode and purposes for which a way is granted or acquired shall affect the right to the same, depends upon whether the change is one of substance, or is in the mere quality of the enjoyment not injuriously affecting the servient estate. Thus if the right of way granted be for the purpose of a way to a cottage, and the cottage is turned into a tanyard, the right of way would be lost. But if there be a grant in general terms of all ways to a cottage, the changing it in the manner supposed would not destroy the right of way, the cottage being the *terminus*, in such case, of the way, and not the particular object with which it must be used.[2]

Where a piece of land was granted with a right of way, for passing and repassing over twenty feet, between two definite lines on the grantor's land, it was held, that this implied a convenient way, having reference to the use and enjoyment of the *granted lands, and not a free and [*55] unobstructed use of the whole twenty feet in width, unless required for the granted estate; and that the placing of obstructions in this space by the owner of the land gave no right of action to the grantee, so long as there remained for him a convenient way.[3] As a general proposition, the owner of a servient estate, over which there is a private way, may maintain gates or bars across the way, provided it do not materially interfere with the use of it, or the way, by the terms of the grant, is to be kept open.[4] But the one who has the right of way may not use it as a place of deposit of articles along its sides.[5] Nor would the land-owner have a right to

[1] Elliott *v.* Rhett, 5 Rich. 405, 421; Gale & What. Ease. 374; Renshaw *v.* Bean, 18 A. & E. N. S. 130, 132.

[2] Allan *v.* Gomme, 11 A. & E. 759; with limitations by Parke, B., in Henning *v.* Burnet, 8 Exch. 187.

[3] Johnson *v.* Kinnicutt, 2 Cush. 153, 156.

[4] Huson *v.* Young, 4 Lans. N. Y. 63; Houpes *v.* Alderson, 22 Iowa, 163; Bean *v.* Coleman, 44 N. H. 539; Connery *v.* Brooke, 73 Penn. St. 80; Wash. Ease. 3d ed. 264, 265.

[5] Kaler *v.* Beaman, 49 Me. 207.

place obstructions in a way which his grantee had occasion to use, if, in his grant, it was called a street, and had been opened as such to the public.[1] If the width and height of the way granted or reserved be not defined in the deed, it shall be such as is reasonably necessary and convenient for the purposes for which it was granted. And this will be partly a question of law, and partly of fact.[2] And though a right of way cannot be granted by parol, yet, if there is in a deed of land a grant or reservation of existing ways and easements actually used and enjoyed therewith, parol evidence is competent to show, as an existing fact, that a particular way claimed has been thus used.[3]

31. As a general proposition, the dominant estate is bound to repair the way it enjoys over the servient estate, though the owner of the latter may, by grant, or reservation, or by prescription, be bound to make the necessary repairs in order to its enjoyment.[4] The consequence is, that the owner of the dominant estate, while he may go on to do all that is necessary to repair the way to render it safe and reasonably convenient,[5] may not, because the way is out of repair, pass over other land of the servient tenement, unless the owner of the latter estate is bound to repair; in which case, he who has the dominant estate may, it would seem, while the way is so out of repair, go upon the adjacent land so far as it is necessary.[6] But he will not, by reason of owning a prescriptive right of way over a servient estate, have a right to dig ditches by the side of the way to make it more con-
[*56] venient, * unless he shall have acquired that right also by prescription.[7]

[1] Tudor Ice Co. *v.* Cunningham, 8 Allen, 139.

[2] Atkins *v.* Bordman, 2 Met. 457.

[3] White *v.* Crawford, 10 Mass. 183; Story *v.* Odin, 12 Mass. 157; Salisbury *v.* Andrews, 19 Pick. 250; Atkins *v.* Bordman, 2 Met. 457; Morris *v.* Edgington, 3 Taunt. 24.

[4] Doane *v.* Badger, 12 Mass. 65; Jones *v.* Percival, 5 Pick. 485; Gerrard *v.* Cooke, 2 B. & P. N. R. 109, 115; Pomfret *v.* Ricroft, 1 Saund. 323, n. 3; Rider *v.* Smith, 3 T. R. 766; 3 Burge, Col. & For. Law, 443.

[5] Gerrard *v.* Cooke, 2 B. & P. N. R. 115; 1 Saund. 322, n. 3, 323, n. 6.

[6] Taylor *v.* Whitehead, Dougl. 745; Bullard *v.* Harrison, 4 M. & S. 387. See Hamilton *v.* White, 1 Seld. 9; Washburn, Easements, 196.

[7] Capers *v.* McKee, 1 Strobh. 164.

32. There are various modes besides the unity of the two estates, which will be considered hereafter, by which a right of way may be lost, abandoned, or extinguished. One of these is by non-user, under such circumstances as to give to the servient estate, as it were, the same right to be freed of the easement as the user originally imposed the way upon it in favor of the dominant estate. In the first place, there is a marked difference between easements acquired by express grant and those established by mere user. Mere non-user in the former case, even for more than twenty years, will not destroy the right, if the owner of the servient estate does no act which prevents the use.[1] And if acquired by prescription, the non-user for twenty years may be explained so as to show that the way was not abandoned, as, where the party who had the way had acquired and used a more convenient one, this was held to afford no evidence that he intended to abandon the first whenever he might have occasion to use it again.[2] A mere non-user for any time less than twenty years does not amount to an abandonment of the right, however the same may have been acquired.[3]

If, however, there has been a cessation for twenty years to use a way originally acquired by use unexplained, it is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some other adverse right, or, where no such adverse right appears, that the former has been surrendered, or that it never existed.[4] The doctrine

[1] Jewett *v.* Jewett, 16 Barb. 150; Elliott *v.* Rhett, 5 Rich. 405, 419; White *v.* Crawford, 10 Mass. 183; Smiles *v.* Hastings, 24 Barb. 44; Arnold *v.* Stevens, 24 Pick. 106; Bannon *v.* Angier, 2 Allen, 128; Jennison *v.* Walker, 11 Gray, 426; Washburn, Easements, 551; Hall *v.* McCaughey, 51 Penn. 43; Cook *v.* Major, L. R. 6 Eq. 177.

[2] Ward *v.* Ward, 7 Exch. 838.

[3] Williams *v.* Nelson, 23 Pick. 141; White *v.* Crawford, 10 Mass. 183; Emerson *v.* Wiley, 10 Pick. 310; Corning *v.* Gould, 16 Wend. 531; Parkins *v.* Dunham, 3 Strobh. 224; Cuthbert *v.* Lawton, 3 M'Cord, 194; Carlisle *v.* Cooper, 4 C. E. Green, 261.

[4] Corning *v.* Gould, 16 Wend. 531; Wright *v.* Freeman, 5 Harr. & J. 477. See Parkins *v.* Dunham, 3 Strobh. 228; Hazard *v.* Robinson, 3 Mason, 272; Hillary *v.* Waller, 12 Ves. 265; 3 Kent, Com. 448. In 2 Pothier, Obligations, 136, is the case of Prescott *v.* Phillips, with the comments of the editor (Mr. Evans), implying an opinion that something more than mere non-user of an easement is required to operate as an abandonment; and a note to 3 Kent, Com. 448, inti-

maintained by the New York courts is, that an easement gained by prescription may be lost by non-user, but it is otherwise if gained by grant.[1]

[*57] *33. A right of way cannot be effectually abandoned or surrendered, any more than it can be created, by a mere parol agreement between the owners of the several estates.[2] But an executed oral agreement to discontinue the use of an old way, and to substitute for it a new and different one, has been held to be competent evidence of the surrender of the right to the old way.[3] And there are many acts of abandonment short of a non-user for twenty years, which, if done by the owner of the dominant tenement, and acquiesced in by that of the servient, may amount to a surrender of such an easement,[4] provided such act of abandonment have been done with such intention.[5] *

* NOTE. — If the case of Pope *v.* Devereux, above cited, is to be taken as determining only a question of the competency of evidence of a surrender of an easement, it may not be open to criticism. But if, as the reader might be led to infer, it maintains the doctrine that an existing easement may be exchanged by parol for another easement of the same kind, and the owner thereby acquire the same property in the new one as he had in the former, and a title to the same equally valid, it is apprehended that it cannot be sustained either upon principle or authority. Jackson *v.* Dysling, 2 Caines' Rep. 201. Arnold *v.* H. R. R. Road, 55 N. Y. 662.

In the case cited, the question, whether the owner of the easement intended to give it up without receiving another equally valid, does not seem to have been

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mates the same opinion. But does it not depend upon the question, whether the original right was acqured by express grant or mere user, the user, in the latter case, being originally the evidence of the claim of right to which the other party yielded, and the non-user, in like way, being evidence of having yielded the right? It seems, however, that the non-user may be explained so as to rebut the presumption of the right having been yielded. Ward *v.* Ward, 7 Exch. 838; Doe *v.* Hilder, 2 B. & Ald. 783, 791.

[1] Pope *v.* O'Hara, 48 N. Y. 452. See also Hayford *v.* Spokesfield, 100 Mass. 494.

[2] Dyer *v.* Sanford, 9 Met. 395; Pue *v.* Pue, 4 Md. Ch. Dec. 386.

[3] Pope *v.* Devereux, 5 Gray, 409. See Wynkoop *v.* Burger, 12 Johns. 222; Hamilton *v.* White, 4 Barb. 60; Gage *v.* Pitts, 8 Allen, 527.

[4] Corning *v.* Gould, 16 Wend. 531; 3 Kent, Com. 448; Dyer *v.* Sanford, 9 Met. 395, 402.

[5] Ward *v.* Ward, 7 Exch. 838; Regina *v.* Chorley, 12 Q. B. 515; Hale *v.* Oldroyd, 14 M. & W. 789; Williams *v.* Nelson, 23 Pick. 141, 147; Dyer *v.* Depui, 5 Whart. 584, 597; Mowry *v.* Sheldon, 2 R. I. 369, 378.

*34. The acts, as already intimated, which would [*58] be construed to operate as a surrender or abandonment of an *easement must be such as, in effect, destroy [*59]

submitted to the jury; and, to sustain the assumption that there was a surrender, it must have been presumed that the owner of the right of way was willing and intended to give it up and extinguish it as it then existed, and to accept in its stead a mere voidable promise to continue a revocable license to use another way, since no new easement could be acquired by a parol license to use a new way, from the fact that such a license, though executed, would be a revocable one. *Ante*, vol. 1, p. *400.

The cases cited by the court to sustain the doctrine laid down in the case were Moore *v.* Rawson, 3 B. & C. 332; Liggins *v.* Inge, 7 Bing. 682; and Dyer *v.* Sanford, 9 Met. 395; which do not strike a casual reader as analogous to the case under consideration. In the first of these, one who had enjoyed the easement of light for a building had torn it down, and erected one with a blank wall, which had stood for seventeen years; in the second, the owner of an easement of flowing back water upon the defendant's land gave him permission to lower the bank of the stream *in his own land*, which reduced the extent of the flowing, and this had been done five years before any complaint; and, in the last, the easement was one of light, and the question was, whether the act which operated to obstruct the enjoyment of the light was a license or an abandonment of the easement. Shaw, C. J., says: "It may well be maintained on the authorities, that the owner of a dominant tenement may make such changes in the use and condition of his own estate as in fact to renounce the easement itself." P. 401.

In Lovell *v.* Smith, 3 C. B. N. S. 120, the head-note is: "A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, affords no evidence of an abandonment thereof." Willes, J., says, after reciting the facts substantially as stated in the head-note above: "It is quite obvious that that was done without any intention on the part of the plaintiff to abandon his original right."

The case of Lovell *v.* Smith is cited with approbation in Hayford *v.* Spokesfield, 100 Mass. 495; and in Erb *v.* Brown, 69 Penn. St. 218, the court say: "The servitude imposed on the plaintiff's estate was created by deed, and, under the statute of frauds, could not be assigned, granted, or *surrendered*, unless by deed or note, or by operation of law. It could not be extinguished or renounced by a parol agreement between the owners of the dominant and servient tenements."

In Reignolds *v.* Edwards, Willes, 282, the owner of land over which defendant had a right of way closed the way and opened another, which the defendant used for many years, when, the owner having shut up the latter, the defendant undertook to pass over it, and broke down the enclosure, for which the owner brought trespass. The court held the defendant liable. "This new way was only a way by sufferance, and either party might determine it at his pleasure; and the plaintiff, in this case, has determined his will by fastening the gate, and so the defendant ought to have had recourse to his old way." P. 287. See also Payne *v.* Shedden, 1 M. & R. 382; Carr *v.* Foster, 3 Q. B. 581.

In Hamilton *v.* White, 1 Seld. 9, the court refer to the above case from Willes "as founded on good sense and sound morals." But they make a distinction between the cases, as in that before them the original way had been

either the object for which it was created; or the means of the enjoyment of it; and these acts must either be done by the owner of the dominant tenement himself, or with his consent by the owner of the servient estate. Thus where one, having a right of way by grant from a parcel of land, made an impassable fence across the same, and continued it for seven years, he did not thereby extinguish the easement.[1] In the cases of Moore *v.* Rawson and Liggins *v.* Inge,[2] referred to in the last note, the act done had the effect of destroying the easement altogether. In Corning *v.* Gould, a narrow passage-way between two adjacent estates for the accommodation of the dwelling-houses thereon had been encroached on, on one side, by a building, and by a fence made along the middle of it by the owner of one of these estates,

closed by the plaintiff for ten years, but the new one had not been closed, and the defendant when he used it, though forbidden, had no other way except by going and breaking down the enclosures across the old way; and it being admitted that the defendant had a right across the plaintiff's land, that the plaintiff hindered him from crossing in the old way, and that the new one was still open, the plaintiff could not, under the circumstances of the case, prohibit his using the latter without opening the former. "If it be admitted that the right to the new track, not being created by grant, nor acquired by user of twenty years, was held at the will of the plaintiff, he ought not to be permitted to put an end to that will without opening the old route, or consenting that the defendants might use it." "If he chose to put an end to the defendants' right of passing by the new way, he should have opened the way to which the defendants had a lawful title." Clearly assuming, it would seem, that the original way was neither wholly abandoned nor extinguished by the substitution, by an executed parol agreement, of another which had not been enjoyed for twenty years. See Smith *v.* Lee, 14 Gray, 473. The court, however, in Smith *v.* Barnes, 101 Mass. 275, seem still to recognize Pope *v.* Devereux, and seek to sustain it by the case of Larned *v.* Larned, 11 Met. 421, where the way which had been used by the *public* across two or more parcels, and the course of the way had been changed by consent of the owner of the servient estate, and of the adjacent owner, within the servient estate. The head-note of the case is: "This evidence was fully competent to prove a *dedication* of the *new* way by the plaintiff's grantor, and that it was assented to by the plaintiff and defendant." Whereas it is a familiar doctrine, that a dedication may be made by verbal declaration accompanied by proper acts. Wash. Ease. 3d ed. 189. While a way between individuals can *only* be granted or created by deed or prescription, which is evidence of a grant by deed. Ibid. 27, 38. Besides, accepting for one interest in real estate a collateral and different interest therein in satisfaction thereof, where no release or actual grant is made, is not binding at common law. *Ante*, vol. 1, pp. 224, *262.

[1] Hayford *v.* Spokesfield, 100 Mass. 491.

[2] Moore *v.* Rawson, 3 B. & C. 332; Liggins *v.* Inge, 7 Bing. 682.

and the latter estate had been conveyed while it was thus obstructed. This grantee objected to an exclusive occupancy by the owner of the other tenement of the part of the passage-way upon his side of the fence; but it was held, these obstructions operated as an extinguishment of the way, they having been made by one owner, and assented to by the other.[1] Nor is it necessary that this obstruction, to have such an effect, should have existed twenty years. In the case of Regina *v.* Chorley,[2] where the defendant had a right of way to his malt-house over plaintiff's land, the court say, that if the defendant *had removed the malt-house, and walled up [*60] the entrance, and then, for any considerable period of time, acquiesced in the unrestrained use by the public, they conceive the easement would have been clearly gone. "It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury." The abandonment in such cases is a question for the jury.[3] But the lessee of premises to which an easement is appurtenant cannot release or abandon it so as to bind the reversioner.[4] If one has acquired a right of way to a certain building by enjoyment or user, and a public highway is laid over the site of the building so as to cover the same, it will extinguish the right of way, that for which it was to be used having been itself destroyed.[5]

35. Many of the rules in reference to easements of ways apply to those of light and air; though, from their nature, it must be obvious, that, in the original acquisition of the right, a different rule must prevail. It has been held at common law, that an uninterrupted enjoyment of light and air by the

[1] Corning *v.* Gould, 16 Wend. 531.

[2] Regina *v.* Chorley, 12 Q. B. 515. See also Manning *v.* Smith, 6 Conn. 289. In Crain *v.* Fox, 16 Barb. 184, A, having a right of way across plaintiff's land to a house which he had removed twelve years before, had closed the way by a board fence at each end, and undertook to cultivate the soil. This was held to be an abandonment of the way.

[3] Taylor *v.* Hampton, 4 M'Cord, 96; Dyer *v.* Sanford, 9 Met. 395; Parkins *v* Dunham, 3 Strobh. 224.

[4] Glenn *v.* Davis, 35 Md 208.

[5] Hancock *v.* Wentworth, 5 Met. 446.

owner and occupant of a house standing near the land of another, over and across such land, for twenty years or more, gains for it a right to continue such enjoyment as an easement. And yet there can have been no *adverse* enjoyment, as in the case of a way acquired over another's land. The owner of the house will, in no manner, have interfered with the free enjoyment by the land-owner of his land. And by holding that, his being suffered to enjoy that which is the common property of all, for a certain length of time, gives him a right to use it, though at the expense of the adjacent land-owner; it leaves no alternative to the latter but to erect obstructions thereto, although such enjoyment in no way injures or affects him, except as creating a prescriptive, adverse right. This, as will be seen, has led the American courts in some cases, and the legislatures in others, to repudiate a doctrine so incompatible with the condition of estates in this country.

[*61] *Neither in England nor in this country does any one acquire any right to light and air across another's land, for the benefit of his house, by simply erecting it upon the border of his own land while the adjoining land is unoccupied. The owner of the latter may, at any time within twenty years, erect a building or other structure upon his land, though he thereby wholly darkens or obstructs the light and air of the first-mentioned house, whatever may be the motives by which he is led to create the obstruction.[1] And it is in this way only that the latter can, by the English common law, prevent the former from acquiring a prescriptive right to this easement by an enjoyment for twenty years; for such easement is not one which is acquired by acts done upon another's land, but by a mere rightful enjoyment of something upon one's own.[2]

The easement, in such case, is acquired, not, as in ordinary

[1] Moore *v.* Rawson, 3 B. & C. 332; Tud. Lead. Cas. 123; Ray *v.* Lynes, 10 Ala. 63; Pierre *v.* Fernald, 26 Me. 436; Dyer *v.* Sanford, 9 Met. 395, 402; Mahan *v.* Brown, 13 Wend. 261; Smith *v.* Kenrick, 7 C. B. 515, 565.

[2] Cross *v.* Lewis, 2 B. & C. 689, per Bayley, J.; Id. 690, per Lauderdale, J.; Parker *v.* Foote, 19 Wend. 309; Stein *v.* Burden, 24 Ala. 130; Harbidge *v.* Warwick, 3 Exch. 552; Renshaw *v.* Bean, 18 A. & E. N. S. 112; Washburn, Easements, 492.

cases, from a presumptive grant from the servient to the dominant estate, as in the case of a prescriptive right of way, but by a presumed covenant by the owner of the servient estate not to obstruct the light in respect to such dominant estate. And therefore it is, that if the owner of the latter tear down the house, and erect it upon another spot, he loses the easement.[1] So if the owner of the house, having acquired a right of easement of light through a certain window, closes it up, and opens another of a different size in a different place, he loses the right altogether. So if he tears down an old house, and builds a new one, his windows must not differ in size or position from the old ones, so as injuriously to affect the occupant of the adjacent land.[2] The mere enlargement, however, of a window, would not destroy the easement if it did not impose a heavier * burden upon the servi- [*62] ent estate than had existed before.[3] Nor would a change in the uses of the room which is lighted by such window make any difference.[4]

It was stated as a general proposition, in an earlier part of this chapter, that if one, owning a house with windows looking out upon adjoining land of his own, sell such house, he may not afterwards build upon such adjacent land, and thereby stop or obstruct the light of such windows.[5] And this doctrine is assumed by the court of Connecticut, who rely upon an ancient English case,[6] to be well founded. But this is denied in some cases, especially by courts which maintain that an easement of light cannot be acquired by mere use and enjoyment in this country.[7] Thus where A owned two

[1] Moore *v.* Rawson, 3 B. & C. 332; Parker *v.* Foote, 19 Wend. 309.

[2] Blanchard *v.* Bridges, 4 A. & E. 176; Cherrington *v.* Abney Mill, 2 Vern. 646.

[3] Tud. Lead. Cas. 132, 133.

[4] Luttrel's case, 4 Rep. 87.

[5] Story *v.* Odin, 12 Mass. 157. See also Grant *v.* Chase, 17 Mass. 443; Cherry *v.* Stein, 11 Md. 24; United States *v.* Appleton, 1 Sumn. 492, 501; Cox *v.* Matthews, 1 Ventr. 239; *ante*, p. *29; Maynard *v.* Esher, 17 Penn. St. 222.

[6] Bushnell *v.* Proprietors, &c., 31 Conn. 158; Rosewell *v.* Pryor, 6 Mod. 116.

[7] Myers *v.* Gemmel, 10 Barb. 543, where it is said that Story *v.* Odin, 12 Mass. 157, was law, not on the ground stated, but because the windows looked out into an open public court. The court, in that case, deny the English doctrine, and hold, that when the lessor let premises opening upon his land, and afterwards built upon this open land so as to darken the windows of the

houses upon adjoining lots, one of which derived its light over the lot on which the other stood, and he sold them to different owners, it was held that the purchaser of the latter might build thereon, although he obstructed the windows of the other house by so doing.[1] In the three cases cited below, but embraced in the same report, the court of Massachusetts review all the cases which had been decided in that State, from Story *v.* Odin downward, and hold unqualifiedly, that if one grants a house having windows looking out over vacant land, whether his own or otherwise, he does not grant therewith any easement of light and air, unless it be by express terms; it never passes by implication.[2] In Royce *v.* Guggenheim[3] it is pretty fairly implied, that, if the easement of light is *necessary* to the enjoyment of an estate granted, it might be so far implied, that the grantor would not be at liberty to destroy it. A similar doctrine is maintained in West Virginia, though it would be limited to "cases of real and obvious necessity." The court discard the English doctrine of ancient lights.[4]

36. The tendency of late years, in this country, has been against the doctrine of gaining a prescriptive right to the enjoyment of light and air, as an easement appurtenant to an estate, on the ground that it is incompatible with the condition of a country which is undergoing such radical and rapid changes in the progress of its growth. And while Illinois and New Jersey, as well as Louisiana, retain the common law on this subject, as it has been understood in England,[5] in New York, Massachusetts, South Carolina, Maine, Maryland,

demised premises, he was not liable to the lessee for so doing. Where two adjacent parcels of land, one having a dwelling-house with windows looking out upon the other, were sold at auction the same day, it was held, that no implied easement of light or air passed thereby with such house, though the deed of the house was first delivered. Collier *v.* Pierce, 7 Gray, 18. See *ante*, p. *29. See Washburn, Easements, 607-622.

[1] Mullen *v.* Stricker, 19 Ohio St. 135. In Jones *v.* Jenkins, the right of one of two purchasers to obstruct the light of another was constructively limited by the terms of the grant.

[2] Keates *v.* Hugo, Eaton *v.* Evans, and Salisbury *v.* Andrews, 115 Mass. 204. See also Randall *v.* Sanderson, 111 Mass. 114.

[3] 106 Mass. 201.

[4] Powell *v.* Sims, 5 W. Virg. 1.

[5] Gerber *v.* Grabel, 16 Ill. 217; Robeson *v.* Pittenger, 1 Green, Ch. 57, 64; Durel *v.* Boisblanc, 1 La. An. 407.

Alabama, Pennsylvania, and Connecticut, it has been discarded.[1]

37. Still there is nothing to prevent acquiring an easement of light and air in this country by an express grant or covenant, in respect to which the same rules of law apply, as regards its enjoyment and any unlawful obstruction thereof, as are known to the English common law. The only difference between the two is in the mode of acquiring the easement. Thus, if one is * obstructed in the enjoyment of [*64] such an easement, he may have an action on the case for the same.[2]

38. In Goodman *v.* Gore it was held that the owner of a windmill might have case against one who had erected a building so near to it as to obstruct the air, and prevent the owner from grinding. And although it does not expressly state that the mill was an ancient one, analogy to the case of other easements would undoubtedly require that it should be.[3]

39. But the right to have a certain prospect from one's estate as an easement cannot be acquired by enjoyment, however long continued. Nor will such a right pass by implication of grant, though it may be created and pass by express grant or covenant. Nor can a man maintain an action for a nuisance against another for erecting on his own land that which obstructs the view from the house of the former, unless the right has been acquired by express grant or covenant.[4]

[1] Parker *v.* Foote, 19 Wend. 309; Myers *v.* Gemmel, 10 Barb. 537; Mahan *v.* Brown, 13 Wend. 263; Banks *v.* Amer. Tract Soc. 4 Sandf. Ch. 438; Mass. Gen. Stat. c. 90, § 32; Collier *v.* Pierce, 7 Gray, 18; Carrig *v.* Dee, 14 Gray, 583; Rogers *v.* Sawin, 10 Gray, 376; Paine *v.* Boston, 4 Allen, 169; Napier *v.* Bulwinkle, 5 Rich. 311, overruling McCready *v.* Thompson, Dudley, 131; Pierre *v.* Fernald, 26 Me. 436; Cherry *v.* Stein, 11 Md. 1, 24, overruling Wright *v.* Freeman, 5 H. & John. 477; Ward *v.* Neal, 37 Ala. 501, overruling Ray *v.* Lynes, 10 Ala. 63; Hoy *v.* Sterrett, 2 Watts, 331; Haverstick *v.* Sipe, 33 Penn. 368, 371; Ingraham *v.* Hutchinson, 2 Conn. 597; Comp. Stat. 1854, p. 636.

[2] McCready *v.* Thomson, 1 Dudl. (S. C.) 131; Mahan *v.* Brown, 13 Wend. 263.

[3] Goodman *v.* Gore, 2 Rolle, Abr. 704. But the doctrine is questioned, if not overruled, in Webb *v.* Bird, 10 C. B. N. S. 269. See also 1 Am. Law Reg. N. S. 637.

[4] Attorney-General *v.* Doughty, 2 Ves. Sen. 453; Squire *v.* Campbell, 1 Mylne & C. 459; Aldred's case, 9 Rep. 58 b; Parker *v.* Foote, 19 Wend. 309; Tud. Lead. Cas. 123.

40. When the subject of easements in the use of water is considered, the distinction should be kept in mind which is familiar to the law, between the right to enjoy the use of water in its natural state, and that which grows out of its application by artificial means. Property in water, in connection with real estate, can only be predicated of its use, which serves by its enjoyment to give a value to the corporeal hereditament with which its use is applied. Thus the riparian proprietor of land bordering upon a running stream has a right to the benefit to be derived from the flow of water thereof, as a natural incident to his estate, and no one may lawfully divert the same against his consent. Nor can this right be considered as an easement, since it belongs to the estate of the landowner through which the water flows, as forming one of the elements of which this estate is composed. Nor does it make any difference that the extent to which he may enjoy [*65] this right may be sensibly * affected by the exercise of a similar right by other riparian proprietors upon the same stream. There are sundry uses which each successive owner along the stream may exercise, though by so doing he impairs to some extent the enjoyment by others of the full flow of the water, provided it be done in a reasonable manner, and not so as thereby to destroy or materially diminish the supply of the water, or render useless its application by the other riparian proprietors, either by the quantity consumed or by corrupting its quality, by throwing it back upon the lands of others above, or diverting and stopping its flow so as to affect such lands below his own premises. Each case must depend upon its own circumstances; but among the uses to which a riparian proprietor may be said to have a natural right to apply the waters of a stream to the extent already indicated are such agricultural and domestic purposes as irrigating his land, watering his cattle, and the like.[1] And to make a riparian proprietor liable for the diversion of water, in

[1] Mason *v.* Hill, 5 B. & Ad. 1; Tud. Lead. Cas. 119; Ang. Wat. Cour. § 136; Wood *v.* Waud, 3 Exch. 748, 775; Embrey *v.* Owen, 6 Exch. 353, citing liberally from 3 Kent, Com. 439, 445; Webb *v.* Portland Co., 3 Sumn. 189, and the counsel cite Tyler *v.* Wilkinson, 4 Mason, 397; Blanchard *v.* Baker, 8 Me. 253. See the American cases collected in 6 Exch. 373, Am. ed.; Sampson *v* Hoddinott, 1 C. B. N. S. 590; Weston *v.* Alden, 8 Mass. 136.

any case, it must be done to such an extent as to cause a perceptible damage thereby to the party who complains of such diversion;[1] the test in such case being a reasonable use of the water of the stream in cases of irrigation, which depends upon the quantity of water, the nature of the soil to be affected by its application, and the like. No one proprietor in such a case has a right to appropriate so much of the stream as essentially to deprive a proprietor below of the benefit of the same.[2] Nor may a proprietor of land upon a stream, for purposes of irrigation, stop the flow of the water by a dam across the stream.[3] And though a land proprietor may for this purpose cut sluices in the banks of a stream in the United States, he may not even do this in England, in order thereby to divert the water on to the land intended to be benefited by irrigation.[4] On the other hand, the owner of land bordering upon a stream may drain his land into the stream.[5] In many cases, however, one land-owner may acquire a right to apply the use of water upon his own land, so as essentially to impair its use by other proprietors above or below him, and even to interfere thereby with the enjoyment of the land of another; as, for instance, by stopping the water of a stream in his own land, and flowing back the same upon the land of a proprietor above him, or diverting it so as to waste it, or prevent its reaching the land of a proprietor below him in its natural and usual quantity. A right thus to interfere with the natural right to make use of water belonging to another, where it is connected with the occupation of land, would constitute an easement in favor of the latter, as the dominant estate. Such an easement may be acquired like other easements, by grant, * or by an adverse enjoyment so long continued [*66] as to raise a legal presumption of a grant.[6]

From the nature of its use, however, there must be cases where a simple occupation of the water of a stream gives the

[1] Elliot *v.* Fitchburg R. R. Co., 10 Cush. 191.

[2] Arnold *v.* Foot, 12 Wend. 330; Miller *v.* Miller, 9 Penn. St. 74.

[3] Colburn *v.* Richards, 13 Mass. 420; Anthony *v.* Lapham, 5 Pick. 175; Sampson *v.* Hoddinott, 1 C. B. N. S. 590.

[4] Embrey *v.* Owen, 6 Exch. 357.

[5] Treat *v.* Bates, 27 Mich. 395.

[6] Manning *v.* Wasdale, 5 A. & E. 758.

proprietor a right to the undisturbed enjoyment of it, without any such evidence of grant as an easement, although by such enjoyment he deprives another proprietor above or below him of the right of a similar application of the water within his own premises, the mere priority of an application to use of the water determining the priority of right. Such would be the case where a stream, flowing through the lands of two or more persons, has a sufficient fall in its current to operate a mill by a dam erected upon the land of either of these proprietors, but only sufficient for a single mill privilege or power. In such a case, the first of these proprietors who shall appropriate and occupy this fall for the purposes of a mill acquires thereby the exclusive right to use the same to the extent to which he shall have actually occupied and appropriated the fall, though by so doing he may prevent the proprietor above or below him from making a similar occupation and appropriation on his own land. He would not, however, by such appropriation, acquire any right to flow back the water of the stream upon the land of the proprietor above him, or to divert it from that of the proprietor below him, without first gaining this as an easement by grant, or an enjoyment for the requisite period of time.[1]

The statutes of several of the States have so far changed the common law as to authorize a riparian proprietor to erect a mill and dam on his own land, and raise a head of water thereby for the working of the same, though by so doing he flows the land of a proprietor above;[2] and in others, provision is made whereby the owner of land upon one side of a stream may extend his dam upon the land upon the opposite [*67] side for the purpose * of working a mill,[3] and in such cases a mode of assessing and recovery of damages by

[1] Mason *v.* Hill, 5 B. & Ad. 1; Williams *v.* Morland, 2 B. & C. 910, 913; Liggins *v.* Inge, 7 Bing. 682; Carey *v.* Daniels, 8 Met. 466; Bealey *v.* Shaw, 6 East, 209; Ang. Wat. Cour §§ 130, 135; Frankum *v.* Falmouth, 6 C. & P. 529; M'Calmont *v.* Whitaker, 3 Rawle, 84.

[2] Mass. Gen. Stat. c. 149, §§ 1, 4; R. I. Rev. Stat. c. 88, §§ 1, 2, 3; Gen. Stat. 1872, c. 92, § 1; Maine Rev. Stat. c. 92, §§ 1, 4; Rev. Stat. 1871, c. 92, §§ 1–4; Ang. Wat. Cour. § 482, as to North Carolina. See Washburn, Easements, c. 3, § 5, pl. 35–46, as to the mill laws of the several States.

[3] This is the case in Virginia, Kentucky, Missouri, Mississippi, Alabama, and Florida. Ang. Wat. Cour. § 483.

the party injured is prescribed in most of these States, which supersedes the common-law remedy for similar injuries.[1] But these statutes do not authorize flowing back water upon an existing mill; nor may any one justify a diversion of water from an existing mill, or impede the working of it by flowing back water, even for the purpose of working a mill upon his own land, unless he shall have acquired a right so to do by grant or prescription, or by reason of his mill being a prior one to that which is thus impeded.[2] And it may be observed in this connection, that, after the proprietor of a mill shall have enjoyed the use of all the water of a stream for the operation of his mill for twenty years, no riparian proprietor of land above may begin to divert the water of such stream for purposes of irrigation, if by so doing he impedes the operation of such mill. He would thereby impair the right of easement which belongs to the estate of the mill-owner.[3]

These remarks as to stopping or diverting the water of a stream apply, however, only to those cases where the water has formed for itself a channel and current along which it is flowing at the time. A man, for instance, may drain his swamp, although by so doing he may prevent the water which was accustomed to collect there from penetrating the earth and thereby finding its way into a stream which flows to an existing mill, and thus diminishes the quantity that is usually supplied thereby. So if the water of a well is accustomed to overflow and spread itself upon the adjacent land without forming any definite channel, the owner may stop such overflow, although he thereby prevents its draining into a ditch through which it finds its way into a mill-stream, and in that way injuriously affects the operation of a mill thereon.[4]

But if a spring issues out of the *ground upon one [*68] man's land, and flows therefrom in a natural channel upon the land of another, the owner of the spring may not

[1] Stowell *v.* Flagg, 11 Mass. 364; Waddy *v.* Johnson, 5 Ired. 333; Hendricks *v.* Johnson, 2 Port. (Ala.) 472; Ang. Wat. Cour. § 484; Veazie *v.* Dwinel, 50 Me. 485.

[2] Mason *v.* Hill, 5 B. & Ad. 1; Carey *v.* Daniels, 8 Met. 466; Ang. Wat. Cour. § 134; Veazie *v.* Dwinel, *sup.*

[3] Cooke *v.* Hull, 3 Pick. 269; Stowell *v.* Lincoln, 11 Gray, 434.

[4] Broadbent *v.* Ramsbotham, 11 Exch. 602; Wheatley *v.* Baugh, 25 Penn. St. 528; Rawstron *v.* Taylor, 11 Exch. 369.

give a new direction to such stream, or waste the water on his own land to the injury of the other land-owner.[1] Notwithstanding the rights which may be acquired in respect to a mill by its prior erection, one may erect a mill upon his own privilege above an existing mill, and operate the same, though he thereby diverts some of the water of the stream, provided he only does what is reasonably necessary in operating his own mill, unless the lower mill shall have acquired an exclusive right to the whole of the stream.[2] And when a right to the use of water has become attached to a mill as an easement, it will not be affected by any change in the character of the mill, or in the wheels by which it is operated, provided the use of the water remains substantially the same.[3]

41. A mill-owner has not only a right to discharge the water from his mill through the natural channel into another's land below his mill, but also to enter and clear such channel from obstructions affecting the free flow of the water.[4] But though these rights are popularly called *easements*, they are rather incidents of property in the estate of the upper proprietor. So he may acquire by grant or prescription a right to discharge the water of his mill by a race-way through the land of another, and, as incident thereto, will thereby have a right to enter and clear the race-way in a customary manner, though he may never have used the right before. But if he owns land on one side of such race-way, he may not use the land of the other beyond what is necessary in removing the materials which obstruct the flow of the water.[5] So one may acquire an easement to discharge water upon the land of another, whether in a pure or noxious state, by an artificial channel, or by a pipe, or by suffering the water from the eaves of his house to fall upon his neighbor's land.[6]

[1] Arnold *v.* Foot, 12 Wend. 330; Wheatley *v.* Baugh, 25 Penn. St. 528; Dudden *v.* Guardians, &c., 1 H. & N. 627; Earl *v.* De Hart, 1 Beasley (N. J.) 280.

[2] Platt *v.* Johnson, 15 Johns. 213; Brace *v.* Yale, 10 Allen, 441; s. c. 97 Mass. 18; s. c. 99 Mass. 488.

[3] Saunders *v.* Newman, 1 B. & Ald. 258; Luttrel's case, 4 Rep. 87; Whittier *v.* Cocheco Mg. Co., 9 N. H. 454.

[4] Prescott *v.* Williams, 5 Met. 429; Washburn, Easements, 226.

[5] Prescott *v.* White, 21 Pick. 341.

[6] Wright *v.* Williams, 1 M. & W. 77; Thomas *v.* Thomas, 2 C. M. & R. 40, per Alderson, B.; Tud. Lead. Cas. 120; Cherry *v.* Stein, 11 Md. 1; Ashley *v.* Ashley, 6 Cush. 70.

*42. One may acquire a right to maintain an aque- [*69]
duct through another's land by a user of twenty years or more. And where such right has once been acquired, it would be no cause of forfeiture of the same if the one having the easement should permit others to make use of the privilege of drawing water thereby, if such use did not transcend the easement as originally enjoyed. Thus where A B, after having acquired an easement of drawing water from a spring in the close of C D for the use of his house, permitted E and F to make use of the same for the benefit of their houses, it was held that the easement was not thereby affected.[1] But where a way or watercourse is granted to run in a particular channel or direction, it gives the grantee no right to divert it, or use it in any other place.[2]

43. If one owns the right of a watercourse in the land of another, it is incumbent upon him to keep the same in repair, unless the land-owner is bound by some covenant to make repairs. And to this end he has the right, as incident to the principal easement, to enter upon the servient estate, and do whatever is necessary to make such repairs, such as digging up the soil and the like, but doing no unnecessary damage thereby.[3]

44. The rule in relation to diverting a natural watercourse, to the injury of other riparian proprietors, does not apply to underground springs of water. So that, if, in digging a well or cellar, or working a mine in his own land, a man cuts off the source which by percolation supplies his neighbor's well, and thereby diverts it into his own, or drains the well of his neighbor, the latter is without remedy: it is *damnum absque injuria*, if not negligently or maliciously done.[4] The rule of the common law upon this subject has been but recently declared by the English courts, although the cases above cited show that it * had been somewhat earlier settled [*70]

[1] Watkins *v.* Peck, 13 N. H. 360.

[2] Northam *v.* Hurley, 1 E. & B. 665; Jennison *v.* Walker, 11 Gray, 423.

[3] Peter *v.* Daniel, 5 C. B. 568; Prescott *v.* White, 21 Pick. 341.

[4] Acton *v.* Blundell, 12 M. & W. 324, cites Dig. Lib. 39, tit. 3, § 12; Greenleaf *v.* Francis, 18 Pick. 117; Ang. Wat. Cour. 3d ed. §§ 109–115; Hammond *v.* Hall, 10 Sim. 551; Smith *v.* Kenrick, 7 C. B. 566. See Washburn, Easements, c. 3, § 7.

in the United States. And in this respect both courts have followed the well-defined rule of the civil law. The first case in which the distinction was settled between the right to enjoy the use of water flowing in a defined current above or underneath the surface, and that of water percolating through the earth, is said to have been that of Acton *v.* Blundell, cited above,[1] which was settled in 1843. Nor was the question decided in the House of Lords till the case of Chasemore *v.* Richards, in 1859.[2] The rule of the civil law is given in the Digest, lib. 39, tit. 3, § 12, in these words: *Denique Marcellus scribit, cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi; nec de dolo actionem: Et sane non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit:* which Maule, J., translates: "If a man dig a well in his own field, and thereby drains his neighbor's, he may do so unless he does it maliciously."[3] The case of Chasemore *v.* Richards, above mentioned, will serve to illustrate the above doctrine. It was first decided in the Exchequer Chamber, and afterwards by the House of Lords, and involved the question how far the owner of land may appropriate to his own use the water that falls upon it in the form of rain and sinks into it, where, by so doing, he prevents its finding its way by percolation into a stream which supplies the mill of another, and thereby injuriously affects such mill-owner. It was held that the right to do this belonged to the land-owner; nor would he be liable for exercising it, though the mill-owner suffered damage thereby. In that case the land-owner dug a large well in his premises, which received the water from the adjacent land; and from this well a considerable neighborhood was supplied.[4] The case of Broadbent *v.* Ramsbotham[5] is in affirmance of the doctrine of Chasemore *v.* Richards, as is that of Rawstron [*71] *v.* Taylor;[6] and they further show that whenever * a

[1] Acton *v.* Blundell, 12 M. & W. 344, per Pollock, C. B.; Dickinson *v.* Canal Co., 7 Exch. 300.

[2] Chasemore *v.* Richards, 5 H. & N. 982.

[3] Acton *v.* Blundell, 12 M. & W. 336. As to the act being malicious or otherwise, see Washburn, Easements, 379–383, and cases cited.

[4] Chasemore *v.* Richards, 2 H. & N. 168; s. c. 5 Id. 982.

[5] Broadbent *v.* Ramsbotham, 11 Exch. 602.

[6] Rawstron *v.* Taylor, 11 Exch. 369.

land-owner has upon his land spongy, boggy, or swampy places, which serve to feed a stream by soaking or percolating through the earth, but whose waters have not been formed into a definite course or stream, he may make any proper use of the waters so collected, although by so doing he diminish the accustomed supply of water of such stream, and thereby injuriously affect the mill-owners upon the same.[1]

Besides the cases already cited from the American reports are those of Roath *v.* Driscoll,[2] Ellis *v.* Duncan,[3] and Wheatley *v.* Baugh.[4] In the first of these, the owner of one parcel sunk a well or artificial watering-place in his premises, which had the effect to diminish the quantity of water in a like well or artificial watering-place in the adjacent land of another owner. In the second, the injury arose from diverting and stopping the underground supply of water, which rose in the plaintiff's ground in a spring, by digging ditches and working a quarry by the defendant on his own land. So, in the last, the plaintiff had a spring upon his land, the waters of which he had applied to the purposes of a tannery. The defendant, in sinking the shaft of a mine on his own land at a distance of five hundred and fifty yards from the spring, cut off the underground supply of the same. But in all these cases it was held that the plaintiff was without remedy for the injury thereby sustained, because the defendants did no more than they had a lawful right to do.[5] So where one sold another the right to draw water from a spring in his land, and then sold the land to another, who dug a well in the same, twenty-seven feet from the spring, which cut off its supply of water, it was held that the owner of the spring was without remedy.[6] But if the percolating waters have collected in a spring, and formed a natural and defined watercourse by which they are discharged, one would have no right to dig in his own land

[1] Luther *v.* Winnisimmet Company, 9 Cush. 171; Dudden *v.* Guardians, &c., 1 H. & N. 627; Dickinson *v.* Canal Co., 7 Exch. 301; Broadbent *v.* Ramsbotham, 11 Exch. 602.

[2] Roath *v.* Driscoll, 20 Conn. 533.

[3] Ellis *v.* Duncan, 21 Barb. 230.

[4] Wheatley *v.* Baugh, 25 Penn. St. 528.

[5] Prickman *v.* Tripp, Skinn. 389; Cooper *v.* Barber, 3 Taunt. 99.

[6] Bliss *v.* Greeley, 45 N. Y. 671, 674.

so as to draw away, by underground percolation, the water from the spring, so as thereby to destroy this natural water-course.[1] And if the waters which have been diverted had formed themselves into a natural defined stream or water-course, such diversion would be the ground of an action by the lower proprietor upon the stream, whether the same, where diverted, were above or underneath the surface.[2] On the other hand, the owner of land, whose underground supply of water has been cut off by one who does not own the [*72] land in which the act * is done, may have an action for the loss thereby sustained. The only ground upon which such act is to be justified is the right incident to the ownership of the land where it is done.[3] Nor may a land-owner poison or foul the water percolating through it, so as to render it deleterious in its qualities when it reaches the adjacent owner.[4]

From this right, *jure naturæ*, to use and appropriate whatever is within one's own premises, and the impossibility there is, in the case of underground percolating waters, of knowing by one owner that the springs which supply the well, or the spring of an adjacent owner, are derived from the land of the former, no length of enjoyment by such well or spring owner of the use of the water thereof will give him any adverse prescriptive right against the adjacent land-owner, since no one can be presumed to have granted that, of the existence of which he could have had no knowledge. The case of Balston *v.* Bensted[5] has been often cited as sustaining a different doctrine; and the opinion of Story, J., in Dexter *v.* Providence Aqueduct Co.,[6] rather favors the idea that one may gain a prescriptive right to the use of water under such circum-

[1] Grand Junction Canal *v.* Shugar L. R., 6 Chanc. Ap. 483, 488; Trustees, &c. *v.* Youmans, 45 N. Y. 362; Wash. Ease. 3d ed. 472–474.

[2] Dudden *v.* Guardians, &c., 1 H. & N. 630; Dickinson *v.* Canal Co., 7 Exch. 301; Smith *v.* Adams, 6 Paige, Ch. 435; Radcliff *v.* Mayor, &c., 4 Comst. 200.

[3] Parker *v.* Boston & M. Railroad Co., 3 Cush. 107.

[4] Hodgkinson *v.* Ennor, 4 B. & Smith, 229.

[5] Balston *v.* Bensted, 1 Camp. 463.

[6] Dexter *v.* Prov. Aq. Co., 1 Story, 393. See also Greenleaf *v.* Francis, 18 Pick. 422; Chasemore *v.* Richards, 2 H. & N. 183, s. c. 5 H. & N. 694; Dickinson *v.* Canal Co., 7 Exch. 282.

stances. But the question has been both directly and indirectly raised and discussed in several modern cases; and it is believed that the law is now settled, so far as it has been settled at all, against the claim of a prescriptive right to the benefit of waters percolating through the land of another.[1]

45. There is a marked and important distinction between the rights which may be acquired by a land or mill owner in a natural stream, and an artificial one which is created for temporary purposes, although these rights have been enjoyed for more than twenty years. Thus, in addition to the cases already cited in respect to natural streams, it is held, that if the owner of the fountain-head of a natural stream within his land divert the waters thereof from their original channel, and suffer them to flow in a new one for twenty years, and in that time an owner below him has applied the water to the use of a mill, *such owner of the fountain can- [*73] not again change its course to the injury of such mill-owner.[2] So if the owner of two lots of land through which a stream of water flows sells one of them, neither he nor his grantee will have a right to stop or divert the stream, since the right to the natural flow of the water is incident to and inherent in the land, in whosesoever hands it may be.[3] But where the watercourse is an artificial one, created by the discharge of water artificially supplied, the riparian proprietors of the lands through which it flows, or the owners of mills or other hydraulic works upon the same, are without remedy, if the owners of the source of supply of such stream so change it as to impair or destroy the benefit of the same to such other owners or proprietors, especially if the original purposes of such watercourse were temporary in their nature. And this is true, though such mill-owner or riparian proprietor may have enjoyed the same for more than twenty years. Thus where a channel was dug to drain the water from certain

[1] Roath *v.* Driscoll, 20 Conn. 541; Wheatley *v.* Baugh, 25 Penn. St. 528; Hoy *v.* Sterrett, 2 Watts, 330; Broadbent *v.* Ramsbotham, 11 Exch. 602; Frazier *v.* Brown, 12 Ohio St. 311; Ingraham *v.* Hutchinson, 2 Conn. 584, 597; Washburn, Easements, 384, 389.

[2] Belknap *v.* Trimble, 3 Paige, Ch. 605; Delaney *v.* Boston, 2 Harring. 489, 491.

[3] Tud. Lead. Cas. 111.

mines, and its outlet was into a stream which carried the plaintiff's mill, and the owner of the mines dug a new channel lower than the first, which drew down the water from the first, so that it could not feed the plaintiff's mill, it was held that the latter was without remedy for the loss. For, first, he knew the purposes for which the channel was dug, and therefore had no reason to suppose he could gain a perpetual right merely by enjoying it so long as to create a prescriptive grant to that effect; and, second, because his enjoyment of the water was in no sense adverse to the owner of the channel, so as thereby to acquire an easement therein. Another illustration of the general proposition is that of the owner of a mine pumping the water from the same, and suffering it to flow for twenty years upon the land of a neighboring proprietor, and thereby enriching it for agricultural purposes. The latter does not thereby gain a right to insist upon the owner of the mine continuing to pump the water, when he has no longer occasion to do so for his own purposes. And [*74] another instance where use will not *give an adverse right is that of water falling from the eaves of one's house; though enjoyed by another for twenty years, the owner may take it down, and put a stop to the same, if he choose.[1] So where A had an artificial drain in his land for agricultural purposes, and suffered the water to flow therefrom to the land of B for twenty years, by which the land of the latter was benefited, it was held that if A deepened and changed his drain, thereby depriving B's land of its benefit, B was without remedy for the loss.[2] But though the one who thus creates the flow of water may stop it if he please, he cannot foul it with impunity while it continues to flow, to the injury of those below upon the stream.[3]

46. Of a nature somewhat akin to the easement of light connected with the ownership of a house is that of support, or the right of having one's land and the structures erected

[1] Arkwright *v.* Gell, 5 M. & W. 203; Tud. Lead. Cas. 120; Napier *v.* Bulwinkle, 5 Rich. 311; Wood *v.* Waud, 3 Exch. 748; Magor *v.* Chadwick, 11 A. & E. 571; Sampson *v.* Hoddinott, 1 C. B. N. S. 590; Washburn, Easements, 294–301.

[2] Greatrex *v.* Hayward, 8 Exch. 291. See Wood *v.* Waud, 3 Exch. 778.

[3] Wood *v.* Waud, 3 Exch. 777.

thereon supported by the land of a neighboring proprietor. The proposition may be stated thus: If A builds his house upon the verge of his own land, he does not thereby acquire a right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the mean time, such adjacent owner may excavate his own land for such purposes as he sees fit; and if in so doing the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there.[1] But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil.[2]

The importance of this subject seems to justify, if not demand, a more extended consideration of the doctrine in the *light of modern decisions. Every one has so far [*75] a right to have his own soil sustained by that of his neighbor, that the latter may not dig so near to the land of the former as to cause the same to fall into the excavation by its own natural weight. He ought to guard against such a consequence by proper care, and the application of proper means of support. The right of lateral support, in such case, is an incident to the land itself. In the language of Rolle: "It seems that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into the pit; and for this, if an action were brought, it would lie."[3] This doctrine is recognized and sustained by Campbell, C. J., in Humphries *v.* Brogden,[4] by Parker, C. J., in Thurston *v.* Hancock,[5] by Ch. Walworth in Lasala *v.* Holbrook,[6] and in Farrand *v.* Marshall,[7] which was very fully and elaborately considered, and strongly sustains the above doc-

[1] Partridge *v.* Scott, 3 M. & W. 220; Wyatt *v.* Harrison, 3 B. & Ad. 871; Thurston *v.* Hancock, 12 Mass. 220, 229; Panton *v.* Holland, 17 Johns. 92; Wilde *v.* Minsterley, 2 Rolle, Abr. 564, 565; Callender *v.* Marsh, 1 Pick. 418.

[2] Hide *v.* Thornborough, 2 Car. & K. 250.

[3] Wilde *v.* Minsterley, 2 Rolle, Abr. 565.

[4] Humphries *v.* Brogden, 12 Q. B. 743.

[5] Thurston *v.* Hancock, 12 Mass. Rep. 229.

[6] Lasala *v.* Holbrook, 4 Paige, Ch. 169.

[7] Farrand *v.* Marshall, 21 Barb. 409, overruling an opinion of Bronson, J.,

trine. But this right of a land-owner to support his land against that of the adjacent owner, does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land so near the boundary-line thereof as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*, a loss for which the person so excavating the land would not be responsible in damages.[1] But even if the house had been recently [*76] erected, * the adjacent owner will be responsible for excavating upon his own land so as to injure or impair its foundations, if the injury results from the negligent, unskilful, and improper manner in which it was done.[2] Or, in the words of the court: "So long as the excavation did not extend beyond their (defendants') own land, and was not negligently or unskilfully done, any injury to an adjacent proprietor would be *damnum absque injuria*."[3] But in a late English case the doctrine seems to be sustained, that, if the digging would not have caused any appreciable damage to the adjacent land in its natural state, it would not be the ground of an action. And this position is laid down in a case where the buildings of the plaintiff were thrown down as a direct or remote consequence of the digging.[4] If, how-

contra, in Radcliff's Ex'r *v.* Mayor, &c., 4 Const. 195, which seemed to have been uncalled for, and *obiter*. See also the same case reported in 19 Barb. 380; Wyatt *v.* Harrison, 3 B. & Ad. 871; Bibby *v.* Carter, 4 H. & N. 153; *ante*, p. *44; McGuire *v.* Grant, 1 Dutch. 356; Charless *v.* Rankin, 22 Mo. 566; Hay *v.* The Cohoes Co., 2 Comst. 162; Richardson *v.* Verm. Cent. R. R. Co., 25 Vt. 465.

[1] Thurston *v.* Hancock, 12 Mass. 220; Partridge *v.* Scott, 3 M. & W. 220; Lasala *v.* Holbrook, 4 Paige, Ch. 169; McGuire *v.* Grant, 1 Dutch. 356; Charless *v.* Rankin, 22 Mo. 556; Napier *v.* Bulwinkle, 5 Rich. 311; Wyatt *v.* Harrison, 3 B. & Ad. 871; Palmer *v.* Fleshees, 1 Sid. 167; Gayford *v.* Nicholls, 9 Exch. 702; Rogers *v.* Taylor, 2 H. & N. 828.

[2] Dodd *v.* Holme, 1 A. & E. 493; Panton *v.* Holland, 17 Johns. 92; Charless *v.* Rankin, 22 Mo. 573; Shrieve *v.* Stokes, 8 B. Mon. 453; McGuire *v.* Grant, 1 Dutch. 356. See Foley *v.* Wyeth, 2 Allen, 131; Richardson *v.* Verm. Cent. R. R. Co., 25 Vt. 465, 471; Washburn, Easements, c. 4, § 1.

[3] Austin *v.* Hudson River R. R., 25 N. Y. 338, 346.

[4] Smith *v.* Thackerah, L. R. 1 C. B. 564; Bonomi *v.* Backhouse, 9 H. L. Cas. 503, s. c. E. B. & E. 622; Stroyan *v.* Knowles, 6 H. & Norm. 454; Brown *v.* Robins, 4 H. & Norm. 186.

ever, as already stated, the structure erected upon the parcel of one is suffered to remain for the period of time requisite to create a prescriptive right, and to enjoy the support of the soil of the adjacent owner, it seems to be conceded by many of the cases cited above, that the latter may not disturb its foundations by digging within his own close, without adopting reasonable and proper precautions to prevent an injury to such house. And the same rule applies where the owner of the adjacent land has conveyed the house, though a modern one. The language of Ch. Walworth, in Lasala *v.* Holbrook, is: "There is another class of cases, however, where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjacent lots, and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title."[1] But it would seem, that, in order to acquire by enjoyment for the requisite period of time a right of support against the land of an adjacent owner for the foundations of a house, it is necessary that this house and its foundations should be in the first place properly constructed. If not *so constructed, [*77] and if, by reason of such defective construction, the excavation in the adjacent parcel causes it to give way, the owner of the land would not be liable.[2] Nor, as it seems, would he be liable if he had no good reason to suppose that such excavation would occasion the injury, and this arose from some unforeseen cause.[3] Upon the principle above stated, that each of two adjacent owners of land must so use his own

[1] Lasala *v.* Holbrook, 4 Paige, Ch. 169, 173. See also Brown *v.* Windsor, 1 C. & J. 20; Slingsby *v.* Barnard, 1 Rolle, 430; Palmer *v.* Fleshees, 1 Sid. 167; Richards *v.* Rose, 9 Exch. 218, 221, that the grant of a house grants support for it by the adjacent land of the grantor. See also Humphries *v.* Brogden, 12 A. & E. N. S. 743, 744.

[2] Richart *v.* Scott, 7 Watts, 460.

[3] Shrieve *v.* Stokes, 8 B. Mon. 453.

as not to infringe on the natural condition of that of the other, where there are two freeholds in the same soil, one in the mines beneath the surface and the other in the surface, as may be and often is the case, the one who excavates for the minerals must be careful to supply all necessary supports for the surface-soil, if his excavation endangers its natural support.[1] And if the owner of the surface have had a house standing thereon for twenty years, the one excavating for minerals is bound to leave or provide support for such house as well as the soil.[2]

47. In some cases, the owners of adjacent houses acquire, or are subjected to, the easement of a lateral support for the wall of one against that of the other. This is the case where one builds several houses in a block, and afterwards sells them to different persons.[3] But where two persons have two houses in juxtaposition, neither has a right to the support of the other, independent of a grant; nor does any length of time furnish evidence of such a grant.[4] Still the owner of either house in that situation may render himself liable to the owner of the other if he tear down his house in a wasteful, negligent, or improper manner, and thereby injure the adjoining one, even though the owner of the latter [*78] omit to take the care which he * might have exercised, and by which he might have avoided the consequences.[5] But if the owner of the building to be removed give notice to the other of his intention to take it down, he is not bound to exercise any extraordinary care in securing the adjacent building from injury thereby.[6]

[1] Humphries *v.* Brogden, 12 Q. B. 739; Harris *v.* Ryding, 5 M. & W. 60; Nicklin *v.* Williams, 12 Exch. 259; Washburn, Easements, c. 4, § 4; Smart *v.* Morton, 5 E. & B. 30; Dugdale *v.* Robertson, 3 K. & Johns. 695, 699, unless the surface-owner had authorized the mine-owner to work his mine without having supports. Rowbotham *v.* Wilson, 8 E. & B. 123.

[2] Rogers *v.* Taylor, 2 H. & N. 828. Whether he would be so bound if the house were a modern one, *quære.*

[3] Richards *v.* Rose, 24 E. L. & Eq. 406, s. c. 9 Exch. 218; Webster *v.* Stevens, 5 Duer, 553; Eno *v.* Del Vecchio, 4 Duer, 53; Solomon *v.* Vintner's Co., 4 H. & N. 598.

[4] Peyton *v.* Mayor of London, 9 B. & C. 725; Napier *v.* Bulwinkle, 5 Rich. 311.

[5] Walters *v.* Pfeil, Mood. & M. 362.

[6] Massey *v.* Goyder, 4 C. & P. 161. See cases, Washburn, Easements, 453

48. The above has been more fully noticed in order to distinguish these cases from those of *party-walls*, so called, which form an important subject in the law of easements. By *party-walls* are understood walls between two estates, which are used for the common benefit of both ; as, for instance, in supporting the timbers used in the construction of contiguous houses standing thereon. But where one owner set his house so as to cover a portion of the land of an adjacent owner, who thereupon erected a house adjoining this, and entered its beams into this wall to the line which divided the two estates, it was held not to constitute it so far a party-wall that the first could call upon the other to pay for any part of it. Having placed it on the second man's land, it gave him a right to use so much of it as stood upon his land, unless this was done by some agreement between them.[1] Where by agreement between two adjacent owners of lots, that one might erect a wall for a building partly on his lot, and partly on the adjacent lot, and the other was to pay for half the wall when he, his heirs or assigns, should build on his lot, and use it as a party-wall, it was held to be a personal covenant, and did not bind the assigns of the one, or give the assigns of the other a right to recover for the half of the wall when occupied by the erection of a building.[2] But building a wall at a joint expense by two parties, which stands one-half upon the land of each, does not make them tenants in common thereof. Each owns his part in severalty, though each has a right to use the wall as an easement. But, if one sees fit to carry up his part higher than the part standing upon the adjacent land, he does not thereby become liable to the owner of the other half, if he does not injure him in the use of the wall.[3] If a wall, erected in the manner and by the parties above supposed, is used by them for twenty years for the purpose of supporting their respective buildings, it acquires the proper character of a party-wall.[4] And where a proper party-wall stands one-

[1] Orman *v.* Day, 5 Flor. 385; Sherred *v.* Cisco, 4 Sandf. 480

[2] Cole *v.* Hughes, 54 N. Y. 444. It was held otherwise in Brown *v.* Pentz, at an earlier date. 1 Abb. N. Y. Decis 227.

[3] Matts *v.* Hawkins, 5 Taunt. 20; Dubois *v.* Beaver, 25 N. Y. 127

[4] Eno *v.* Del Vecchio, 4 Duer, 53 ; Dowling *v.* Hennings, 20 Md. 179.

half upon the land of each of the adjoining parties, neither can underpin his half of it separately, if by so doing he injures the house of the other. And if the doing it in that way was an act of carelessness, the other owner, if injured thereby, may maintain an action for the injury.[1]

It does not seem to be necessary that a party-wall should stand half upon each of the adjoining parcels of land. It may stand half upon each, or wholly upon one, and may, or may not, be the common property of the two proprietors. [*79] The * rights of the parties in respect to the same may be collected and determined from the manner in which the parties have used the same for the period of time requisite to create a prescriptive right.[2]

49. Somewhat analogous to easements in party-walls is that which the owner of the lower half of a dwelling-house may acquire to have his part protected by the roof over the upper part. The upper part, in such a case, becomes servient to the lower; but the owner of the latter cannot compel the owner of the roof to repair it, unless he has gained such a right by usage or grant. But he may himself enter upon and repair it when necessary.[3] But while the Scotch and French laws are full and minute in prescribing the relative rights and duties of the owners of distinct parts of the same house, the common law is singularly defective in this respect. That there may be separate freeholds in different portions of the same house has already been stated. And it is well settled, that the owner of any one part has no right to do any thing which shall impair or cause an injury to the other part or parts of such house.[4] But this does not meet the question, what the owner of one part is bound to do in the way of repairing his own premises, if, without his act, they become

[1] Bradlee *v.* Christ's Hospital, 4 Mann. & G. 761.

[2] Cubitt *v.* Porter, 8 B. & C. 257; Wiltshire *v.* Sidford, Id. 259. See Washburn, Easements, c. 4, § 3. The subject of *party-walls* is fully treated of, in the light of the French law, in Le Page's edition of Désgodet's *Lois des Bâtiments*, c. 3, § 2, art. 1; *Mûrs Mitoyens*, pp. 39–122; Dubois *v.* Beaver, *sup.*; Dowling *v.* Hennings, *sup.*

[3] Pomfret *v.* Ricroft, 1 Wms. Saund. 322, n. 1; Tud. Lead. Cas. 127.

[4] Harris *v.* Ryding, 5 M. & W. 60, 76; Dugdale *v.* Robertson, 3 K. & Johns. 700.

damaged or decayed? In one case, Kent, Ch., was inclined to adopt in equity the French law, by which the walls of the house, or any other parts which are of common use and benefit to the entire structure, are the subjects of a common charge for repair to all the owners.[1] And in a case in Massachusetts, the court, in speaking of co-tenants of a house suffering it to go to decay, say: "Neither can complain of the other until after request and refusal to join in making repairs."[2] In another case in the same court, Parsons, C. J., refers to a case from Keilwey, which implied an obligation on the part of the owner of the lower part to repair the timbers of that part. But Lord Holt doubted the law.[3] It was intimated by the same judge (Parsons) that a writ *de domo reparanda* would lie in favor of one of the owners against the other. But the court of Connecticut held that no action at law would lie in favor of one of such owners against the other — the owner of the lower story, for instance, against the owner of the upper one — for not repairing the roof, and that his only remedy would be in equity.[4] There is a case, however, in Modern Reports, which holds that in such a case the owner of the lower room may have an action against the owner above to compel him to repair his roof, or the owner above against the one below to compel him to maintain his foundation.[5] So that the limit and extent of these reciprocal rights and liabilities may be regarded as yet undefined by the common law. The more modern cases seem to go to confirm the doctrine, that there is no remedy at common law for the owner of one part of a house to recover of the owner of another part of it for repairs made for him upon his part, though the other part is thereby benefited. This was held in case of tenants in common.[6] So where the house consisted of two tenements adjacent to each other.[7] So where one owns an upper story,

[1] Campbell *v.* Mesier, 4 Johns. Ch. 334.

[2] Doane *v.* Badger, 12 Mass. 65, 70.

[3] Loring *v.* Bacon, 4 Mass. 575; Keilwey, 98 b, pl. 4; Tenant *v.* Goldwin, 6 Mod. 311; s. c. 2 Ld. Raym. 1089, 1093.

[4] Cheeseborough *v.* Green, 10 Conn. 318.

[5] Anonymous, 11 Mod. 7.

[6] Calvert *v.* Aldrich, 99 Mass. 74.

[7] Pierce *v.* Dyer, 109 Mass. 374.

and repairs the roof.[1] But if the subject of property be owned in common, and cannot be divided, and one make necessary repairs after requesting the other to join in making them, and he neglects or refuses to do so, it seems that he may call on his co-tenant for contribution.[2]

50. One may acquire, as against his neighbor, a right to carry on a noisome and offensive trade upon his own premises, by having exercised the right, without objection, for the term of at least twenty years.[3]

51. A several or exclusive right of fishery in the estate of another may be acquired by an adverse, uninterrupted, and exclusive use and enjoyment of the same for more than twenty years;[4] unless, when the use began, the owner were a minor, in which case no prescriptive right can be gained but by twenty years' enjoyment after he shall have become of age. And the same is true if the owner were insane.[5] And if the use began in the life of a father, his death, and the descent of the estate upon his minor heir, will suspend the acquisition of the prescriptive right during such minority. But if the enjoyment is continuous, and the periods during the life of the ancestor, and after the heir arrives at age, added together, will make an aggregate period of twenty years, it will be sufficient.[6] No easement of fishery in public rivers can be gained by prescriptive user against the State, no matter how long it may have continued.[7]

52. A right in the nature of an easement may arise by grant or prescription in favor of the owner of one parcel of

[1] Ottumwa Lodge *v.* Lewis, 34 Iowa, 67; Cheeseborough *v.* Green, 10 Conn. 318; Graves *v.* Berdan, 26 N. Y. 501; McCormick *v.* Bishop, 28 Iowa, 239, 240.

[2] Mumford *v.* Brown, 6 Cowen, 474; Coffin *v.* Heath, 6 Met. 80; Wash. Ease. 3d ed. 599–602.

[3] Elliotson *v.* Feetham, 2 Bing. N. C. 134; Dana *v.* Valentine, 5 Met. 8.

[4] Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 29; Hart *v.* Hill, 1 Whart. 138; Beekman *v.* Kreamer, 43 Ill. 448.

[5] Edson *v.* Munsell, 10 Allen, 557.

[6] Melvin *v.* Whiting, 13 Pick. 184. See Hargr. Law Tracts, 5. But whether a party can prescribe for a several fishery in the estate of another, without alleging some estate of freehold in himself, is a question stated but not settled in the case of McFarlin *v.* Essex Co., 10 Cush. 310, where the case of Melvin *v.* Whiting is commented on. *Ante*, *48.

[7] State *v.* Company, 49 N. H. 254; Tinicum Fishing Co. *v.* Carter, 61 Penn St. 36.

land to have the occupant of an adjacent parcel make and maintain a fence upon the dividing-line between the parcels. Such right * would of course be extinguished [*80] if the same person were to become the sole owner of both parcels.[1] But if the estates were sold in parcels to different purchasers, the burden or benefit, as the case might be, would pass with the parcels of the respective estates, as something charged upon, or appurtenant to, the same.[2] The party, however, who was bound to maintain the fence, would not be liable for damage occasioned by cattle, from want of or defect in such fence, unless they had been rightfully upon the adjacent land.[3]

53. Where one erected a wharf below low-water mark, and enjoyed the use of it long enough to acquire a prescriptive right to maintain it there, the right was held to be limited to the mere maintenance of the wharf itself, and did not extend beyond the land covered by the wharf, so as to give him the easement of wharfage for vessels adjacent to the same.[4] But the owner of land bounded upon the sea may, it seems, build a wharf adjoining his land, and enjoy it as his own property, if he do not thereby interfere with the free navigation by the public.[5] This right of a riparian owner to construct a wharf adjoining his land and extending it beyond low-water mark, so far as it applies to Lake Champlain, is denied by the court of Vermont.[6] So a question has been made how far access to tidal-water by the owners of land adjoining the same is so much of an incident of ownership thereof as to entitle them to damages if they are deprived thereof by means of an embankment, like a railroad constructed by legislative authority along in front of such lands, but not actually occupying

[1] Boyle *v.* Tamlyn, 6 B. & C. 329; Rust *v.* Low, 6 Mass. 90, 97; Binney *v.* Hull, 5 Pick. 503; Adams *v.* Van Alstyne, 25 N. Y. 232; s. c. 35 Barb. 9. Such fence, it seems, may be placed one-half upon the land of each conterminous owner, if there is no prescription to the contrary. Sparhawk *v.* Twichell, 1 Allen, 450; Duffy *v.* N. Y. & Harlem Railroad Co., 2 Hilton, 496; Harlow *v.* Stinson, 60 Me. 349; Bronson *v.* Coffin, 108 Mass. 175.

[2] Adams *v.* Van Alstyne, 25 N. Y. 232, 235.

[3] Pool *v.* Alger, 11 Gray, 489.

[4] Gray *v.* Bartlett, 20 Pick. 186.

[5] Burrows *v.* Gallup, 32 Conn. 501; Yates *v.* Milwaukee, 10 Wall. 497; Watson *v.* Peters, 26 Mich. 517; Weber *v.* Harbor Commissioners, 18 Wall. 64.

[6] Austin *v.* Rutland, &c. R. R. Co., 45 Vt. 215.

any part thereof. The weight of opinion in the leading English case [1] appears to be in favor of such a claim. But in the American cases cited below the doctrine is denied, unless some part of the land of such owner is appropriated in the construction of such embankment.[2] But if one without right extend his wharf beyond low-water mark into navigable waters, it does not give a right to any other person to enter upon and use the same.[3]

54. There is a class of cases where it is difficult to determine whether the right claimed is an easement belonging to a person as the owner or occupant of some particular estate, or is one which he is at liberty to avail himself of as a customary right, to which the residents of a particular town or locality are entitled. In some instances, as in the case of a way, a landing-place, and the like, the same individual can prescribe for its use both as an easement belonging to his estate, and as a customary right by reason of his residence.[4] Whether, therefore, the right claimed depends upon custom or prescription, must be referred to the circumstances whether it is a local usage or a personal claim, or a claim dependent upon a particular estate. If the claim is a customary one, it may be sustained if it be an easement only in *alieno solo*, as for a way, to take water from a spring, for liberty to play at rural sports, to draw nets on another's land, to pass free of toll, for a public landing-place, and the like.[5]

But a customary right to take profits in another's land, such as taking away gravel or sand for building, and the like, cannot be acquired in favor of the residents in any particular town or locality, though it may be by grant or prescription in favor of an individual as attached to a particular [*81] estate, or of a body * politic and its successors.[6] But

[1] Buccleuch *v.* Metropolitan R. R., L. R. 5 E. & I. App. 438.

[2] Stevens *v.* Patterson R. R., 34 N. J. 532; Gould *v.* Hudson River R. R., 6 N. Y. 522; Tomlin *v.* Dubuque R. R., 32 Iowa, 106.

[3] Wetmore *v.* Brooklyn Gas Co., 42 N. Y. 384.

[4] Perley *v.* Langley, 7 N. H. 233; Kent *v.* Waite, 10 Pick. 138, 142; 2 Steph. Com. 1st Am. ed. 34.

[5] Perley *v.* Langley, 7 N. H. 233; Coolidge *v.* Learned, 8 Pick. 503, 505; 2 Steph. Com. 1st Am. ed. 34; Race *v.* Ward, 4 E. & B. 702.

[6] Perley *v.* Langley, 7 N. H. 233; 3 Dane, Abr. 21, 248; Thomas *v.* Marsh-

for a body politic, like a town, to acquire a prescriptive right, requires that the acts by which it is claimed to have been done should be corporate acts, and prescribed for in a *que estate*, since the acts of individuals, unless done by authority of the town, will not be sufficient.[1] A prescriptive right to take profits in another's land must, however, be for specific purposes, and limited in extent. Thus, where one owning a brick-kiln claimed a right to dig in another's land so much clay as he had occasion for using at his kiln, and had enjoyed it thirty years, it was held to be a bad prescription, since it might extend to carrying off the entire parcel of the other's land.[2]

55. If the owner of the servient estate do any thing to obstruct, interfere with, or impair the enjoyment of an easement therein, the owner of the dominant estate may maintain an action therefor, even though he may not be able to prove any injury and actual damage to have been occasioned thereby; because a repetition of such acts might, in time, ripen into an adverse right. The law in such cases will presume a damage, in order to enable the party to vindicate his right.[3] Or the owner of the dominant estate may enter upon the servient estate, and remove any obstructions wrongfully placed there to the detriment of his easement in the same. If these are created by the owner of the servient tenement, the one entitled to the easement may make such entry without any previous request to have them removed. But if erected by

field, 10 Pick. 364; Sale *v.* Pratt, 19 Pick. 191, 197; Green *v.* Putnam, 8 Cush. 21; Commonwealth *v.* Law, 3 Pick. 408, 413; Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 16 Pick. 512; Blewett *v.* Tregonning, 3 A. & E. 554; Race *v.* Ward, 4 E. & B. 702; Waters *v.* Lilley, 4 Pick. 145; Bland *v.* Lipscombe, 4 E. & B. 714, n.; Washburn, Easements, 76.

[1] Green *v.* Chelsea, 24 Pick. 71, 79; Washburn, Easements, 79, 80; Nudd *v.* Hobbs, 17 N. H. 525.

[2] Clayton *v.* Corby, 5 Q. B. 415; Wilson *v.* Willes, 7 East, 121.

[3] Atkins *v.* Bordman, 2 Met. 457, 469; Nicklin *v.* Williams, 10 Exch. 259; Webb *v.* Portland Co., 3 Sumn. 189; Bower *v.* Hill, 1 Bing. N. C. 549, where the defendant was held liable for building over a channel through which the plaintiff had a waterway, although at the time it was choked up and impassable. Bolivar Mg. Co. *v.* Neponset Mg. Co., 16 Pick. 241; Bliss *v.* Rice, 17 Pick. 23. "It is sufficient to show a violation of a right." Embrey *v.* Owen, 6 Exch. 353; Ashby *v.* White, 2 Ld. Raym. 938; Stowell *v.* Lincoln, 11 Gray, 435.

a stranger, or by the grantor of the owner of the ser-
[*82] vient estate, it seems that there *should be a prior request. So if the effect of an act done on the servient estate will be to create a nuisance, the owner of the dominant estate need not wait till some actual injury has been suffered. And he may, moreover, where his title is clear, have an injunction to restrain a nuisance to the enjoyment of his easement.[1]

56. An easement may be destroyed or determined in various ways. It may be released by the owner of the dominant to the one who owns the servient estate. So it may be extinguished or lost by being abandoned.[2] Thus, where one, who had acquired an easement of light and air for a certain window in his house, walled up the window, and kept it so for seventeen years, during which time the owner of the adjacent lot built thereon, and the original owner subsequently opened his window again, it was held, that he had by his first act abandoned and lost the easement, and could not require the adjacent owner to remove the obstruction. Upon an actual suspension of the use, if he intends to retain the right, he ought to do some act to indicate this intention.[3] The question of abandonment is, however, one for the jury; and in order to have a mere non-user by the owner of a dominant estate for less than twenty years operate as an abandonment, he must have done such acts as reasonably led the adjacent owner to believe he had abandoned the easement, who must thereby have been led to incur expense upon his own estate, acting upon such belief.[4]

[1] Tud. Lead. Cas. 129; Penruddock's case, 5 Rep. 100 b.

[2] Tud. Lead. Cas. 130; Washburn, Easements, c. 5, § 5; Dikes *v.* Miller, 24 Tex. 424.

[3] Moore *v.* Rawson, 3 B. & C. 332; Dyer *v.* Sanford, 9 Met. 395, 402; Manning *v.* Smith, 6 Conn. 289.

[4] Parkins *v.* Dunham, 3 Strobh. 224; Stokoe *v.* Hewsingers, 8 E. & B. 31, where the owner of a warehouse with windows stopped some of them on the inside, which remained so for nineteen years; when, finding the adjacent owner was about to build, as if the right of light for these windows was abandoned, he opened them, and it was held he had not lost the easement. But it seems a *bona fide* purchaser of such adjacent land will be protected in the enjoyment of the property as it appears at the time of his purchase. Corning *v.* Gould, 16 Wend. 531.

But a mere non-user for less than twenty years will not in any case operate as an abandonment of an easement, though originally acquired by user.[1] And where it has been created * by express grant, no length of non-user will, [*83] in most, if not all cases, operate as an abandonment, where there has been no hostile or adverse acts done by the owner of the servient estate during that time, extinguishing such right and creating an adverse prescription.[2]

57. There are, however, acts, which, if done by the party entitled to the easement, and found to be done with an intent to abandon the same, will have that effect. Thus if a mill-owner tears down his mill, with an intent not to occupy the privilege again, he leaves it open to any one below or above to occupy. Or if he do any acts indicating an abandonment, accompanied by a declaration of the intention with which it is done, it will operate an extinguishment of the right, especially if others are thereby led to incur expense in occupying it. And the mere suffering a dam and mill which had been in part washed away to remain in that condition for twenty years has been deemed to be an abandoment.[3] But, as already stated, while an abandonment must be effected by some act, and a mere declaration of an intention to abandon will not be sufficient, whether the act shall amount to an abandonment or not, depends upon the intention with which it is done. Thus, where one had an ancient pond and a flow of water to it, and dug three other ponds and took the water to them, suffering the first to become filled with rubbish, and it turned out that he had not good title to the land on which the last-mentioned ponds were dug, it was held, that he had

[1] Williams *v.* Nelson, 23 Pick. 141; Hatch *v.* Dwight, 17 Mass. 289; Emerson *v.* Wiley, 10 Pick. 310; White *v.* Crawford, 10 Mass. 183; Parkins *v.* Dunham, 3 Strobh. 224; Ersk. Inst. 371; Ward *v.* Ward, 7 Exch. 838; Wilder *v.* St. Paul, 12 Minn. 192.

[2] Jewett *v.* Jewett, 16 Barb. 150, which was a case of a watercourse; Ang. Wat. Cour. § 252; White *v.* Crawford, 10 Mass. 183; Arnold *v.* Stevens, 24 Pick. 106, a case where a right to dig mines was held not to be lost by forty years' non-user; Smiles *v.* Hastings, 24 Barb. 44; Bannon *v.* Angier, 2 Allen, 128; Jennison *v.* Walker, 11 Gray, 423.

[3] Liggins *v.* Inge, 7 Bing. 682, by Tindal, J.; French *v.* Braintree Mg. Co., 23 Pick. 216; Hatch *v.* Dwight, 17 Mass. 289.

a right to resume the occupation of the first, and to make use of the water for that purpose.[1]

58. So an easement may be abandoned or suspended by a license to the owner of the servient estate to do acts [84*] *upon his * own estate* which operate perpetually to destroy or temporarily to suspend the easement, if he executes this license; for such a license, when executed, is irrevocable. Thus, if one, having an easement of light and air over another's land, authorizes him to erect a wall, which he does, and thereby obstructs the enjoyment of these, the easement will be lost, as long as the wall stands, as he cannot revoke a license executed upon the licensee's own land.[2]

59. So the owner of an estate may destroy an easement belonging to it, if he so alters his estate as materially to increase the burden upon the servient estate, especially if the easement is of a nature not divisible, and the increase cannot be separated from the original servitude. If it can be thus separated, the original may remain unimpaired. Thus, if one have a footpath, and use it with horses, he would be liable in trespass for such use, but would not thereby lose his easement of a footway.[3] But where one had an easement of light by a certain window, and stopped it up, while he opened another in a different place and of a different size, it was held, that he had no right to use these, and was without remedy upon their being stopped by an adjacent owner.[4] But the mere enlargement of an old window, or changing one kind of house into another, which does not increase the burden upon the servient tenement, and where the change is not in the substance, but in the mere quality of the dominant tenement, as altering a fulling-mill into a grist-mill, requiring no more

[1] Hale *v.* Oldroyd, 14 M. & W. 789; Dyer *v.* Sanford, 9 Met. 395.

[2] Dyer *v.* Sanford, 9 Met. 395, 402; Tud. Lead. Cas. 110, 130; Liggins *v.* Inge, 7 Bing. 682, where a mill-owner authorized a riparian proprietor above to lower the bank in his own land, and thereby diminish his quantity of water. Winter *v.* Brockwell, 8 East, 308. The case of a license to put a skylight over the servient estate, stopping the air, &c. Morse *v.* Copeland, 2 Gray, 302; Dyer *v.* Sanford, 9 Met. 395; Addison *v.* Hack, 2 Gill, 221; Elliott *v.* Rhett, 5 Rich. L. 405, 418, 419.

[3] Garritt *v.* Sharp, 3 A. & E. 325; Tud. Lead. Cas. 132.

[4] Blanchard *v.* Bridges, 4 A. & E. 176; Cherrington *v.* Abney Mill, 2 Vern 646.

water to carry it, or substituting one kind of wheel for another, does not impair the right to enjoy the light in the one case, and the use of the water in the other, to the extent of the original easement.[1] So the change of a crooked * channel of a watercourse to a straight one will not [*85] affect the right to maintain it.[2]

The following may be cited in addition to the cases already given, as illustrating how an easement may be lost by an act of abandonment. The owner of an ancient mill had acquired, as such owner, a right to flow the land of another above his mill. He took down the mill, and erected it at a point above the former site, and run it there for some years. While he was so running it, the plaintiff purchased the land formerly flowed. The mill having been carried away, after having stood nine years, the owner rebuilt it upon its former site, and flowed the land, which he formerly had done. It was held he had, by this act of abandonment, lost the easement of a right to flow the plaintiff's land.[3]

60. It may be stated in general terms, that by unity of possession of the dominant and servient estates in the same person, by the same right, the easement before existing in one in favor of the other is extinguished and lost, or suspended, according to the nature of the estates which are thus united.[4] If the dominant estate be for years, while the servient is in fee, such union will operate only as a suspension, and not as an extinguishment of the prior existing easement. It will revive upon the determination of the estate for years. In such case there is a union of possession, but not of seisin. To operate as an extinguishment of the easement, the tenant of both tenements must have the same estate of inheritance in both, equal in validity, quality, and all other circumstances of right.[5] But if the title to one of the two tenements turns

[1] Saunders *v.* Newman, 1 B. & Ald. 258; Tud. Lead. Cas. 132, 133; Chandler *v.* Thompson, 3 Camp. 80; Luttrel's case, 4 Rep. 87; Whittier *v.* Cocheco Mg. Co., 9 N. H. 454; Washburn, Easements, c. 5, § 3.

[2] Hall *v.* Swift, 6 Scott, 167; Bullen *v.* Runnels, 2 N. H. 255.

[3] Taylor *v.* Hampton, 4 M'Cord, 96. [4] Atwater *v.* Bodfish, 11 Gray, 150.

[5] Thomas *v.* Thomas, 2 C. M. & R. 41 and note; Pearce *v.* McClenaghan, 5 Rich. 178; Tud. Lead. Cas. 130; Tyler *v.* Hammond, 11 Pick. 193, 220; Grant *v.* Chase, 17 Mass. 443; Binney *v.* Hull, 5 Pick. 503.

out to be defective, and is thereby defeated, the unity of the seisin alone, in the mean time, will not be held to have extinguished the easement previously existing.[1] So [*86] *where the owner of a dominant estate, to which an easement of drawing water by aqueduct-pipes over a servient tenement is appendant, buys in the servient estate, and then cuts off the pipes, the easement is extinct at once.[2] And in such a case, if the owner of both the estates sells what had been the servient estate to another, the easement does not revive again, unless expressly reserved in making such conveyance.[3] But if that ease or accommodation which, while the estates were separately owned, constituted an easement in favor of one, remains in use, and is apparent and continuous, and reasonably necessary to the enjoyment of what had been the dominant estate, it would, upon a division of the estate by conveyance, revive without any express words of grant.[4]

61. But unity of possession of two parcels does not have this effect upon rights in a natural stream of water flowing through them both. And if the owner were to sell the lower one, he would not have a right to divert the water from the same, since a right to enjoy the flow of the water was appurtenant to the land itself, and passed with the land. So if one have a mill and a race-way by an artificial channel below it to take off the water from the mill, and he conveys the mill only, the right to use the channel as a race-way would pass with it as an appurtenance. So it might be with an artificial drain, designed for the benefit of two houses, if the owner sell one of them. Whether the right to use such drain passes with the house or not, depends upon whether its use is separable, and capable of being separately enjoyed or not.[5] But where the owner, for instance, of two tenements, one of which had been used in connection with the other so as thereby to

[1] Tyler *v.* Hammond, 11 Pick. 193. [2] Tud. Lead. Cas. 112.

[3] Manning *v.* Smith, 6 Conn. 289; Collier *v.* Pierce, 7 Gray, 18, 20; Johnson *v.* Jordan, 2 Met. 234, 239; Ersk. Inst. 370.

[4] Dunklee *v.* Wilton R. R. Co., 4 Foster (N. H.), 489; Grant *v.* Chase, 17 Mass. 443; Seibert *v.* Levan, 8 Penn. St. 383; Washburn, Easements, c. 5, § 2; *ante*, p. *38.

[5] Johnson *v.* Jordan, 2 Met. 234; Collier *v.* Pierce, 7 Gray, 18, 20.

enjoy light for its windows, sold that tenement to one with "all the lights, easements, rights, privileges, and appurtenances," and at the same time sold the other tenement to another, it was held, that, under the terms of the grant, the right to light through its windows across the other parcel would pass. But this, of course, is by force of the language of the grant, and not properly as an easement, appurtenant to the same.[1] It may be further remarked, that as easements or servitudes are incorporeal rights, affecting lands * which belong to another proprietor, few of them are [*87] capable of proper possession. The lands, indeed, which are charged with the servitude, may be possessed ; but it is the owner of the servient tenement who possesses these, and not he who claims the servitude. The use, therefore, or exercise of the right, is to servitudes what seisin is to land itself.[2]

62. Although it may, at first sight, seem somewhat out of place to speak of a property in mines under the head of incorporeal hereditaments, its character varies so materially depending upon the circumstances under which it is considered, that the present connection seems as proper as any one in which to notice it. Viewed in one light, a property in mines is strictly an incorporeal one ; in another, it is as decidedly that of a corporeal hereditament. This grows out of the fact already stated, that there may be two distinct and separate freeholds in the same parcel of land, if it contain minerals, quarries of stone, and the like, the one embracing the surface, the other the mines. And these may belong to separate and distinct owners. This has now become a familiar doctrine.[3] Besides this, there may be distinct ownerships in the minerals contained in the same parcel of land. One may own the iron, another the limestone : so one may own one vein of coal, and another a separate vein, if distinguishable, lying beneath or by the side of the other, within the same parcel of land.[4] On the other hand, whoever owns the

[1] Swansborough *v.* Coventry, 9 Bing. 305. [2] Ersk. Inst. 353.

[3] *Ante*, vol. 1, p. *5 ; Adam *v.* Briggs Iron Co., 7 Cush. 366 ; Caldwell *v.* Fulton, 31 Penn. St. 478 ; Stewart *v.* Chadwick, 8 Iowa, 468 ; Barnes *v.* Mawson, 1 M. & Sel. 84 ; Benson *v.* The Miner's Bank, 20 Penn. 370 ; Clement *v.* Youngman, 40 Penn. 341.

[4] Caldwell *v.* Copeland, 37 Penn. St. 427.

surface is presumed to own, and would originally actually own, whatever minerals there might be beneath such surface, until he shall have granted away the one or the other, and thus separated their ownership. But in doing this, he may, as in the grant of the land itself, part with the full title and entire property, or he may carve out a partial interest and ownership which shall create only an easement in the same, while he retains the fee in himself. Thus he may grant to another the entire body of minerals within his land, retaining only his property in the surface, whereby he would create an independent freehold and inheritance in his grantee; or he may grant a right or privilege to take minerals from his land, without parting with the fee in any part of the same, and may still retain his ownership in all the minerals contained therein which shall not have been taken and appropriated by his grantee. In the latter case, he only creates and grants an easement to his grantee, a mere incorporeal hereditament. Many of the questions, therefore, which have arisen in this country, have turned upon the point, whether the grant under which the claimant makes title was of the entire mineral as one freehold, or of a right to take it in the nature of an easement. From the impossibility of making livery of seisin of minerals in place in the earth, the English courts have been formerly inclined to treat grants of them in the light of incorporeal hereditaments. But in this country, where the delivery and recording of a deed have so generally been deemed equivalent to livery of seisin, this strictness has not been observed. But still, in both countries, the inquiry often turns upon the terms of the grant, whether of the entire mineral, or a right to take it, not as realty, but under a right to convert it into personalty by working or mining it.[1] An early and leading case upon this subject is that of Lord Mountjoy, which is reported in various places. In that case, the grantor of a manor reserved to himself by covenant from the grantee a right to dig for ore in the waste of the manor, and to dig turfs there sufficient to make alum and copperas. It was held to be an incorporeal hereditament, and one which was

[1] Caldwell *v.* Fulton, 31 Penn. St. 478; Shep. Touch. 96; Doe *v.* Wood, 2 B. & Ald. 724; Clement *v.* Youngman, 40 Penn. 341.

not the subject of division so as to be exercised by several different owners of the same right.[1] In the above case, the right was not to an unlimited dominion over the ores and turf. So where the grant was not of the ore in a particular locality *in solido*. But a grant of an exclusive right to search for and dig and carry away iron-ore and limestone in a certain parcel of land, the grantee paying so much for every ton of ore he should take from the land, was held to be an incorporeal hereditament even in respect to the limestone. And it was held generally, that where the grant is of an undefined part of the profits of land, like a right to dig turfs and carry them away, it would not pass a title to the land itself.[2] Such a grant may perhaps be of the nature of a mere license, although it be exclusive in its character.[3] But where the grant was of a right to dig coal under the grantor's land, described "to any extent," it was held to be the grant of complete dominion over the mineral therein, and to carry a freehold interest therein. The court say: "Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such." And though the grant in this case was of a right to *take* the coal, it was held to be a grant of the coal itself as a freehold.[4] As a consequence of this double ownership of the surface and mines below, no mine-owner is affected by any acts of possession for gaining an adverse title done upon the surface. Nor can one gain a title to mines by prescription, because prescription applies only to incorporeal hereditaments. But one may acquire a title to a mine by adverse, exclusive enjoyment of the same against the owner thereof. So he may, by prescription, acquire the right to work a particular mine, but not the exclusive ownership thereof.[5] In accordance with the above doctrines, a lease

[1] Huntington and Mountjoy's case, Godb. 17; s. c. 4 Leon. 147; 1 Anderson, 307. See also Caldwell *v.* Fulton, *sup.*

[2] Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290.

[3] Clement *v.* Youngman, 40 Penn. St. 341; Caldwell *v.* Copeland, 37 Penn. St. 427; Co. Lit. 4 a; Bainbridge on Mines, &c., 254, 255; Grubb *v.* Bayard, 2 Wallace, Jr., 81; Doe *v.* Wood, 2 B. & Ald. 719.

[4] Caldwell *v.* Fulton, 31 Penn. St. 478; Armstrong *v.* Caldwell, 53 Penn. 287.

[5] Caldwell *v.* Copeland, 37 Penn. St. 427; Adam *v.* Briggs Iron Co., 7 Cush 366; Shep. Touch. 96.

of the right and privilege to mine or take away stone or coal from certain veins in the lessor's land is the grant of an interest in land, and not a mere license to take coal.[1] Another incident to the distinctive character between the grant of a mine, and of a right to take an undefined part of the minerals in a certain parcel of land, has already been stated. In the first, the right is susceptible of subdivision of ownership by conveyances from the owner of the entire interest; whereas the mere right to take minerals is an entire thing, and is not divisible so as to be shared by several claiming under the original proprietor thereof, and a conveyance of part of it extinguishes it altogether.[2]

63. While what is above stated may be regarded as a brief summary of some of the common-law rights of the respective owners of lands and the mines contained in them, without any attempt to define what are the rights of mine-owners in respect to working them, there has grown up in a pretty large region of this country a peculiar system of laws in relation to mining rights, which it seems proper to notice as a part of the American law on the subject. These laws took their rise in California upon the discovery of the extensive deposits of precious metals with which that country abounds, and have been, as is understood, substantially adopted in the other new States and Territories in which these metals are found. They apply only to operations for minerals upon the public lands; while in respect to mines or lands containing mineral deposits, which belong to individuals as private property in fee, the ordinary rules of the common law serve to define and ascertain the rights of their proprietors.[3] The policy of that State has been, from an early period in its history, to encourage the opening and working of mines upon the public lands. By her legislation upon the subject, she established the policy of permitting all who desired to work her mines of gold and

[1] Harlan *v.* Lehigh Coal, &c., 35 Penn. St. 292; Caldwell *v.* Fulton, *sup.*

[2] Mountjoy's case, Godb. 17; Caldwell *v.* Fulton, *sup.*; Van Rensselaer *v.* Radcliff, 10 Wend. 639.

[3] Henshaw *v.* Clark, 14 Cal. 464. The custom among miners of appropriating mining claims on unoccupied lands, and working them at a certain percentage of return products, seems to have been borrowed from the ancient Spanish laws. Desloge *v.* Pearce, 38 Mo. 598.

silver with or without condition. But as the fee of the land was still held to be in the State until sold and conveyed, the common law afforded but little aid, by the way of precedent, in fixing the rights of parties who undertook to execute the license thus created. And yet, as in order to do this it often required the expenditure of large sums of money in permanent structures and excavations, and a more or less extended actual occupation and possession of particular parcels of land, it became necessary to adopt some rule and standard by which the conflicting rights of such miners to these possessions might be regulated and determined. This was done by a general provision of law, that these conflicting claims should be adjudicated by the rules and customs which might be established by bodies of miners working in the same vicinity in which they arose.[1] A statute of 1852 accordingly gave permission to persons to dig and work mines upon public lands, even though already occupied for grazing and agricultural purposes; although, as against all persons but the true owner, such occupation would otherwise give a right of continued possession, upon the principle that *prior in tempore, potior in jure*.[2] This right to work the mines carried with it a right to use the streams of water which were accessible for the purpose, and to that end to dam or divert them. But one

[1] Hicks *v.* Bell, 3 Cal. 227; Table Mo. Tunnel Co. *v.* Stranahan, 20 Cal. 208.

[2] Stoakes *v.* Barrett, 5 Cal. 39; Clark *v.* Duval, 15 Cal. 88; McClintock *v.* Bryden, 5 Cal. 100, 101; Rogers *v.* Soggs, 22 Cal. 444. A valuable and exhaustive work has recently been published by Mr. Yale upon "Legal Titles to Mining Rights and Water Rights in California," to which the reader is referred for a detailed account of the rise, origin, and provisions of the laws mentioned in the text. And although in certain localities they have a direct and practical application, the present work has already grown to such a size, in treating upon what is of general interest to an American lawyer, that the subject has not been extended in the present edition as might be, on some accounts, desirable. Chap. 8 of Mr. Yale's work gives a synopsis, among other things, of what the rules and regulations of the miners are, as to location of, extent of claim to, and mode of working, mines. Chap. 10 points out how mining claims may be transferred. Chap. 14 treats of the rights to appropriate and use natural and artificial streams of water in mining; and chap. 19 treats at length of the Act of Congress of 1866, giving the freedom of the mineral lands of the public domain to exploration and occupation, and the details of its provisions. And to treat of these alone would obviously require space which the present work cannot afford.

miner might not divert a stream which had previously been occupied by another, nor one which had been applied to the working of an existing mill;[1] nor had a miner a right, in prosecuting his operations, to disturb the occupation of land by a hotel-keeper actually settled thereon.[2] The questions, therefore, that have arisen in respect to mines upon public lands, have chiefly been between miners themselves, or between miners and the occupants of lands for agricultural purposes. And in determining the rules to be applied in such cases, the courts have felt bound to take notice of the political and social condition of the country. They accordingly held that the interest of the possessor of a mining claim was property, and was subject to be seized and sold on execution;[3] that though such miner enters upon the public land, and works the mine within it by permission only of the government, so long as this permission is unrevoked he may have the same remedy against a stranger for disturbing his possession as if he were the true owner of the premises, and that he has a good vested title to the same until divested by the superior title of the true owner.[4] It is accordingly held that he may sell or hypothecate his claim, and that he holds the same subject to taxation as property.[5] And that this property in the mine has all the qualities and incidents of a freehold estate, with the exception, perhaps, of the effect of abandoning the same:[6] ejectment would accordingly lie to recover the same, and, like other real actions, would be local in its character.[7] And it requires a deed in order to convey it.[8] As a general rule, the public mineral lands of the State are open to all persons who, in good faith, enter upon them for mining purposes.[9] But to justify such an entry and claim,

[1] Irwin *v.* Phillips, 5 Cal. 146, 147; Sims *v.* Smith, 7 Cal. 148; Tartar *v.* Spring Creek, &c. Co., 5 Cal. 398; Ortman *v.* Dixon, 13 Cal. 33; McDonald *v.* Bear River, &c. Mining Co., 13 Cal. 220.

[2] Fitzgerald *v.* Urton, 5 Cal. 308.

[3] McKeon *v.* Bisbee, 9 Cal. 137.

[4] Merced Co. *v.* Fremont, 7 Cal. 326.

[5] State *v.* Moore, 12 Cal. 71.

[6] Merritt *v.* Judd, 14 Cal. 64.

[7] Watts *v.* White, 13 Cal. 321.

[8] McCarron *v.* O'Connell, 7 Cal. 152. But by statute of 1860, no seal is required to pass title to a mining right, but a writing is. St. John *v.* Kidd, 26 Cal. 271, 272; Patterson *v.* Keystone Min. Co., 30 Cal. 360.

[9] Smith *v.* Doe, 15 Cal. 106; Gillan *v.* Hutchinson, 16 Cal. 156.

the claimant must show, 1, that the land is public; 2, that it contains minerals; and 3, that he entered *bona fide* for the purpose of mining them; and if he can show this, he can, after having entered, hold against all the world but the government to whom the land belongs.[1] The title by which mining claims are held is that of possession. But this is regulated and defined by usage and local and conventional rules, and must be in accordance with those rules.[2] And when the miners of a neighborhood have met and agreed upon a set of rules upon the subject, the courts do not inquire into the forms of holding such meeting, but adopt these as the law of that vicinity, provided they are not in conflict with the general laws of the State.[3] Thus these rules, among other things, may fix the quantity of ground which any one miner may claim under his *location* for mining purposes, though they cannot limit the number of claims which any one may acquire and hold by *purchase*.[4] And if he takes up a larger quantity than that fixed by the rules, though he cannot hold it against another wishing to *locate* the same for mining purposes, his possession will be good as to all others.[5] So they may fix the mode of making a *location* of a mining right, which is generally done by posting upon the premises a notice of the requisite form; and the right of one miner, it seems, may be lost and acquired by another, if such notice is taken down by the first occupant and replaced by the second, if he take actual possession accordingly. But where one took up a claim for himself and another in their joint names, and posted notice accordingly, he could not, by taking down this notice and posting notices in the names of others, deprive his original co-tenant of his property in the mining right. The title to the land in the mean time, however, remains in the public unchanged.[6] Under the Mexican law, a conveyance of land by the government did not carry the precious metals within

[1] Lentz *v.* Victor, 17 Cal. 274.

[2] Attwood *v.* Fricot, 17 Cal. 43; McGarrity *v.* Byington, 12 Cal. 426; Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 208.

[3] Gore *v.* McBrayer, 18 Cal. 588; English *v.* Johnson, 17 Cal. 118.

[4] Prosser *v.* Parks, 18 Cal. 47. [5] English *v.* Johnson, 17 Cal. 118.

[6] Gore *v.* McBrayer, 18 Cal. 588; Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 207; Johnson *v.* Parks, 10 Cal. 446.

it, unless expressly granted; whereas, by the law of California, such a conveyance, whether by the State or the United States, to private owners, carries the minerals, unless the same are expressly reserved in the grant.[1] By the English common law, mines of gold and silver belonged to the crown, as an incident to the royal prerogative.[2] In the grant of the English colonies in New England, the crown reserved one-fifth of the precious metals; and mines were leased by the colonial government to such as discovered them, subject to this reservation.[3] In New York, these metals belong to the people as successors of the sovereignty.[4] *

* Note. — The legislation and course of decisions, some of which have been cited above, under which this branch of the law in California has received a practical and intelligible form, owes much of its character and consistency to the late Chief Justice of that court, now transferred to a court of wider jusisdiction, who has had the rare privilege of taking a prominent and leading part in adapting the infant institutions of that vast Commonwealth to its growing wants and rapid development, and in ingrafting upon the vigorous stock of the American common law a system of rules and principles suited to the peculiar condition in which a great people, born as it were in a day, found themselves, upon assuming the character of an independent State.

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1 Moore *v.* Smaw, 17 Cal. 199.

2 Co. Lit. 4 a; Plowd. 313.

3 3 Dane, Abr. 137.

4 Willard, Real Estate, 50. See Wms. Real Prop. 14, note.

CHAPTER II.

USES.

SECT. 1. Uses prior to Statute 27 Hen. VIII.
SECT. 2. Uses under the Statute Hen. VIII.
SECT. 3. Of Uses raised by Devises.
SECT. 4. Of destroying or suspending Uses, and of their Application.
SECT. 5. Uses applied in the several States.

* SECTION I. [*91]

USES PRIOR TO THE STATUTE 27 HENRY VIII.

1. Division into legal and equitable estates.
2. History of uses.
3. *Fidei-commissum* and *usufructus*.
4. Uses introduced by the ecclesiastics.
5. The double nature of uses requires two parties.
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16. No use implied where one is expressed in deed.
17. No use results, if a consideration is paid.
18. Parol declaration of use enforced, if for a consideration.
19. Rules of law as to real property applied to uses.
20. How uses were devisable before the statute of wills.
21. How uses might be alienated.
22. How a use might be severed from the legal estate.
23. Forms and incidents of the transfer of uses.
24. Rules as to legal estates not affected by those of uses.
25. Rules of conveyance of uses, unlike those at law.
26. Uses had no incidents of tenure. Of jointure.
27. Only remedy of *cestui que use* in chancery.
28. How uses may be lost.
29. Baron Gilbert's explanation of privity and confidence.

1. THE next class of interests in real property to be considered, in the proposed order of arrangement, are not only of an incorporeal character, but are, from their nature, to be traced to a different source from any of those which have thus far been treated of, except what may have been embraced under mortgages. With this single exception, the estates which have been examined had their origin and derived their qualities and incidents from the common law; whereas that class which is now to be treated of was derived from the rules and principles which prevail in courts of equity. And this diversity of origin gave rise to the terms "legal" and "equitable," by which the two classes of estates are distinguished. Under the latter are embraced Uses, which are to form the subject of the present chapter.

2. Before entering into the details of the law applicable to uses, it seems proper briefly to notice their history and general character. They lie at the foundation of the whole system of trusts, enter essentially into the forms and effect of modern conveyancing, are constantly applied in framing and carrying out family settlements; and though no longer existing as a distinct species of property, they are made to play too important a part in the law of real property as a system to be passed over without a somewhat extended examination. The history of their rise, the attempt to suppress them by legislative enactments, and the final moulding and blending of their qualities and incidents into the common law, present a remarkable illustration of the irresistible power of the common will of a people to make for itself such amendments in the existing laws as their necessities demand, independent of the recognized system of legislation through which a State is governed. The common law, in its feudal elements, had little reference to trade or commerce. The relation of lord and vassal recognized no ownership in land beyond an oc-
[*92] cupancy and possession by some * acknowledged proprietor, who was to perform the requisite feudal services belonging to the same. And it was, as has heretofore been stated, by slow degrees only that land became alienable at all. When, therefore, commerce began to develop itself, and to stimulate the awakening spirit of the

English people, it is not surprising that ingenuity was quickened to devise some means by which real estate should receive the quality of convertibility in some more flexible form than that which had hitherto been known to the feudal law. This was aided by the ingenuity of English ecclesiastics in their attempts to evade the laws against mortmain, which the barons and other landed nobility had procured to be enacted to counteract the grasping cupidity of the Church at that day. In a superstitious age, among a people whose passions were under little restraint, and who were taught to believe that expiation for sin might be made by acts of consecration of worldly possessions to the advancement of the Church, it had become customary to transfer lands to ecclesiastical establishments for religious uses, till attempts were made to prevent this, first by the 36th chapter of Magna Charta, in 1217, and afterwards by the statute 7 Edw. I., *De Religiosis*, in 1279, prohibiting the conveyance of lands in *mortmain*, under the penalty of forfeiting the same to the crown or the chief lord of the fee, under whom the lands had originally been held.

The mode in which it was attempted to evade these laws was this: There had from an early period been a high officer in the kingdom with judicial powers and functions, under the name of Chancellor,[1] — an office which was early filled by an ecclesiastic. As a judicial officer, he drew many of his rules and notions of chancery law from that of Rome. Prior to the time of Augustus, the Romans had, by a variety of independent laws, excluded many classes of persons from taking property as *heirs*, which term included as well those who took by devise as by descent. Among these, for instance, women were excluded by the Voconian law.[2] Hence it became customary, in order to * evade these laws, [*93] for persons wishing to constitute others as their heirs who could not take property by direct appointment to give the same to some one qualified to take as heir, with a request that he would restore the inheritance, or some principal part of it, to the one who was the real object of the donor's

[1] 1 Camp. Lives of Chancellors, 30.

[2] 1 Brown, Civil Law, 304; Thrupp, Hist. Tracts, 220.

bounty.[1] There was not, however, until the time of Augustus, any means of enforcing an execution of this confidence. It depended entirely upon the good faith of the person named as the heir.[2] During his reign, the consuls were directed to compel a performance in such cases; and afterwards a prætor was created, to whom jurisdiction over questions of this character was specially assigned.[3]

3. Where property was given in this way it was called a *fidei-commissum*, and is to be distinguished from a *usufructus*, which was a mere right to use or enjoy what was another's, without spoiling or diminishing it; and, as Bacon says, "is nothing like in matter to uses." "But that which resembleth the use most is *fidei-commissio*."[4] The twenty-third title of the second Book of the Institutes relates to this class of interests, and provides for an examination upon oath of the person named as heir, whether the property was not given him in trust.

4. What had been so common under the Roman law served as a ready hint to clerical chancellors, willing to advance the cause of the Church, and not over-scrupulous in respect to the means by which this was to be done. And although there may be some question whether they actually introduced the doctrine of uses into the English from the civil law, they were the first to supply a remedy by which to enforce them, and thus give form and efficiency to the system.[5] The clergy were thereby furnished with a ready means by which [*94] to evade the *statutes of mortmain, by simply having lands conveyed in fee-simple to some one in whom the Church might confide, upon the faith that he should permit the ecclesiastical body intended to be benefited to enjoy the profits of the estate.[6] But though an attempt was made by the statute of 15 Rich. II., c. 5, to counteract this scheme, by requiring lands held "to the use of religious people or

[1] 1 Spence, Eq. Jur. 436. [2] Bac. Law Tracts, 515.

[3] Inst. 2, 23, 12; 1 Spence, Eq. Jur. 436; Bac. Law Tracts, 315.

[4] Bac. Law Tracts, 315, where the form of a testament giving an inheritance to one to the use of another is quoted in these words: *Heredem constituo Caium, rogo autem te, Caie ut hereditatem restituas Seio.* Cornish, Uses, 10.

[5] 1 Report, Eng. Com. Real Est. 8; Bac. Law Tracts, 318, 324.

[6] 1 Spence, Eq. Jur. 440; 2 Black. Com. 328.

other spiritual persons," to be *amortised* by license of the king and lords, or to be sold to some other use, and extending to guilds and fraternities the prohibition against holding lands to the use of other persons, the mischiefs of evading the rules of the common law in respect to the titles to lands continued to be felt. By means of these uses, which were ordinarily of a secret nature, it became customary also for laymen to put their estates beyond the danger of forfeiture by any act of which they might be guilty, as well as beyond the reach of their creditors.[1] This was the case to a remarkable extent during the civil wars between the Houses of York and Lancaster, where the triumph of either faction was followed by attainder and confiscation of the estates of those who had taken part against them.[2] This history of the introduction of uses into the English law fully justifies what is charged in respect to them, that their adoption was the fruit, first of fraud, and afterwards of fear.[3]

5. Enough has now been said to have it understood that there must be at least two persons and two distinct interests in respect to lands in order to create a use. The original feudal notion remained of seisin and possession in some one who held these as the only owner known to or recognized by the law. So far as he was bound by any trust or confidence to permit this holding to be for the benefit of a third person, he was amenable only to the jurisdiction of the chancellor. The one * who thus held the land was called a [*95] *feoffee to use*, and sometimes a *trustee*, while he for whose benefit the land was thus held was called a *cestui que use*.[4]

6. Various definitions of a use are given by the early writers. But, without attempting to follow or discriminate between these, it will be sufficient, with the foregoing explanation, to define a use to be the right in one person, called a *cestui que use*, to take the profits of land of which another has the legal title and possession, together with the duty of defending the

[1] Sand. Uses, 17; 1 Spence, Eq. Jur. 440, 443; Burgess *v.* Wheate, 1 W. Black. 135.

[2] 1 Spence, Eq. Jur. 441.

[3] Chudleigh's case, 3 Rep. 123.

[4] Co. Lit. 271 b, Butler's note, 231, § 2.

same, and of making estates thereof according to the direction of such *cestui que use*.[1] A use was not a something issuing out of land like rents, nor annexed thereto like rights of common or conditions, but was collateral to the possession of the feoffee, and of those claiming that possession under him. Between the feoffee and the *cestui que use* there was a confidence touching the land, annexed in privity to the estate and to the person.[2] Lord Mansfield speaks of a use as a chose in action.[3] But in respect to legal ownership, it was neither *jus in re*, — an estate in a thing; nor *jus ad rem*, — a right of demand in *law* for the thing. The only remedy for a party claiming a use must be sought in chancery.

7. The early books speak of trusts in connection with the subject of uses, and it is well to distinguish between the two as to the sense in which they were then used. Where the right of taking the profits of an estate was so created as to be a general and permanent one, it was called a Use.[4] Where the purpose of the holding was a temporary one, or special in its nature, it was known as a Trust.[5] Special trusts seem to have preceded general uses in point of time in their [*96] introduction into * the English law.[6] And trusts were themselves distinguished into those which required of the trustee some active duty in respect to the estate, and were therefore called active trusts; and those of a permanent character, in respect to which no active duty was imposed upon the trustee.[7] Both these were counted trusts, and were called by that name.

8. Uses were first transplanted into England about the close of the reign of Edward III., 1377.[8] But before the reign of Edward IV., between 1461 and 1483, not more than half a

[1] Tud. Lead. Cas. 252; Chudleigh's case, 1 Rep. 121; 2 Bl. Com. 330; Bac. Law Tracts, 307. Bacon says: "The *use* is but the equity and honesty to hold the land *in conscientia boni viri*." Law Tracts, 150.

[2] Cornish, Uses, 17; Chudleigh's case, 1 Rep. 121; Co. Lit. 171 b, Butler's note, 231, § 2; Tud. Lead. Cas. 253; 1 Spence, Eq. Jur. 448, note.

[3] Burgess *v.* Wheate, 1 W. Bl. 158; Bac. Law Tracts, 303; 1 Spence, Eq. Jur. 442; Cornish, Uses, 17.

[4] Sand. Uses, 3; Bac. Law Tracts, 306.

[5] 1 Cruise, Dig. 246; Cornish, Uses, 14; Tud. Lead. Cas. 255.

[6] Sand. Uses, 7.

[7] 1 Spence, Eq. Jur. 448.

[8] 2 Bl. Com. 328.

dozen cases had been mentioned in the books; and not one had occurred where a contingent use had been limited over to a stranger.[1] Nor did uses at any time acquire any validity by the common law. Whatever force they ever had was by statute.[2] Mr. Barrington gives an account of what he calls the first case in which the Court of Chancery determined upon a feofment to a use, which arose in the 18 Edw. IV. (A. D. 1479). The next was in the 21 Edw. IV.; and he states "that these *fidei-commissa* and ingenious inventions were at first much discountenanced."[3]

9. The only resort which a *cestui que use* at first had for enforcing the use was the good faith of the trustee.[4] But in the reign of Richard II. (about 1380), John De Waltham, Bishop of Salisbury, who was Master of the Rolls, and at one time Keeper of the Great Seal, but never Chancellor, as he has sometimes been called, invented the "writ of subpœna," returnable into chancery, by means of which a *cestui que use* might call the feoffee to use to account under oath in a court of chancery.[5] The first mention of uses in an English statute was in 7 Rich. II. c. 12, 1384; though by *trusts* spoken of in the 30 Edw. III., and 7 Rich. II., uses are believed to have been intended.[6] The civil wars, as before mentioned, led to their *general adoption among the laity; and it [*97] is said that, in the time of Henry V. (1413–1422), the greater part of the lands in the kingdom were held to uses.[7] It may be added, that appeals began to be taken in that reign to chancery to enforce trusts in a mode more effectual than a

[1] Bac. Law Tracts, 313.

[2] Bac. Law Tracts, 319, 324.

[3] Barring. Statutes, 444, 445.

[4] Tud. Lead. Cas. 252.

[5] Cornish, Uses, 12; 1 Spence, Eq. Jur. 338, note. Sir J. Mackintosh ascribes this writ of subpœna to a desire to reach justice in the ordinary courts, because the turbulent barons had bidden defiance to the ordinary jurisdiction and processes of law. 16 Law Rev. 325.

[6] Bacon, in commenting upon the statute 7 Rich. II., indulges in the following approximation, to wit: "The words used were *opus* and *usus*, and like enough to be the penning of some chaplain that was not much passed his grammar, where he had found *opus* and *usus* coupled together, and that they did govern the ablative case; as they do, indeed, since this statute, for they take away the land, and put them into a conveyance." Law Tracts, 318.

[7] 1 Spence, Eq. Jur. 441; Co. Lit. 272 a; Bac. Law Tracts, 319.

demand addressed to the honor of the feoffee, or enforced through a confessor.[1] In view of these changes, and of the fact that the judges of the common-law courts recognized uses and trusts as proper and legitimate subjects of the chancellor's jurisdiction as early as the reigns of Henry VI. and Edward IV.,[2] Bacon remarks: "And therefore we may truly conclude that the force and strength that a use had or hath in conscience is by common law, and the force it had or hath by common law is only by statutes."[3] At first, this process in equity ran only against the trustee himself, but not against his heir or alienee. And this continued to be the case till the time of Henry VI., when it was extended to heirs, and afterwards to alienees who took with notice of the trust.[4] To all other persons, the feoffee was as much the real owner of the fee as if he did not hold it to the use of another.[5]

10. The courts of common law did not recognize the rights of a *cestui que use* either to the land or its profits, nor was there any form of action at law by which these rights could be enforced;[6] and it is stated by Bacon that no statute was ever made for the benefit of *cestui que use*, but only for the benefit of strangers against *cestuis que use* and their feoffees.[7] The consequence was, that if a disseisor ousted the feoffee to use, or his tenant, equity could furnish no relief, and it became the duty of the feoffee, in order to protect the [*98] interest of his *cestui* * *que use*, to resort to some proper form of action at law for the recovery of the estate.[8]

11. Having thus given in outline a sketch of the process by which uses obtained a foothold in English jurisprudence, and of the mode thereby provided for maintaining and enforcing them, the general subject is open as to what might be conveyed or held to use, who might be feoffees and who *cestuis que use*, and by what means uses might be created or transferred before the statute of 27 Hen. VIII. And it becomes impor-

[1] 1 Spence, Eq. Jur. 444. [2] 1 Spence, Eq. Jur. 446.

[3] Bac. Law Tracts, 324.

[4] Bac. Law Tracts, 318; 1 Spence, Eq. Jur. 445; 2 Bl. Com. 329; Burgess v. Wheate, 1 W. Bl. 156.

[5] Co. Lit. 271 b, Butler's note, 231, § 2; 1 Spence, Eq. Jur. 445.

[6] 1 Spence, Eq. Jur. 442.

[7] Bac. Law Tracts, 319. [8] 1 Spence, Eq. Jur. 445.

tant for the reader clearly to apprehend the law of uses in its details, as it existed before the enactment of that statute, in order to understand how it was that courts afterwards were able to originate and build up the system of trusts, as well as of conveyances of land, which so generally prevails in England and the United States, and owes its origin to the provisions of that statute. In respect to what might be conveyed or held to use, it may be stated generally that all lands and hereditaments, incorporeal as well as corporeal, in possession, reversion, or remainder, might be conveyed by way of use. It was necessary, however, that the property conveyed should be *in esse* at the time, and capable of having what answered to the seisin thereof, given instantly and simultaneously with the creation of the use.[1] Therefore, though a man might convey lands to another and his heirs to the use of a third person for years, he could not so convey them if he had only a leasehold interest therein for years, since he had no seisin to part with upon which the use might depend.[2] So, for the same reason, no one could raise a use in favor of another by a covenant to stand seised to use of land of which he has no title or possession.[3] Nor were ways, commons, annuities, and the like, the subjects of a use.[4]

12. In the next place, any and all persons who could be feoffees of land at common law might be feoffees to use, and * were competent to be seised accordingly, [*99] and could be compelled by chancery to execute the use. This included infants and *femes covert*. But corporations could not be seised to use, one reason being that chancery was supposed to have no means of compelling an execution of the use.[5] But it is now held generally in the United States that corporations may be seised to uses, provided the same are not alien to the purposes for which they were created.[6] All persons, including corporations, who could

[1] Crabb, Real Prop. § 1610.
[2] Crabb, Real Prop. § 1612; 2 Bl. Com. 331.
[3] Yelverton *v.* Yelverton, Cro. Eliz. 401.
[4] 1 Cruise, Dig. 340.
[5] 1 Cruise, Dig. 340; Crabb, Real Prop. § 1607.
[6] Ang. & Ames, Corp. c. v. §§ 6–8.

take estates by conveyance at common law, could take as *cestuis que use*. But this did not extend to aliens.[1]

13. While considering the manner in which uses might be raised or created, as well as what were their incidents, and how they might be transferred when created, it should be borne in mind that these matters were dependent upon rules established by chancery in the exercise of a power akin to legislation. Without interfering with the legal estate which the feoffee had derived by the action of the common law, chancery compelled him to exercise his legal rights in subordination to the protection and enjoyment of the equitable interest in another, which was a creation of its own, and one not known to the common law.[2] From uses being of an impalpable nature, which could neither be possessed nor delivered, in the sense known to the common law, chancery, in treating of them, had no regard to the doctrine of seisin, livery, feofment, tenure, and its incidents, and the like.[3]

14. Nor was any act of notoriety required to give effect to a use, since the purposes of secrecy, for which uses were originally adopted, as well as their nature, assumed that no such notoriety was contemplated. Nor was any prescribed form of raising or declaring a use required, an oral declaration even being often *sufficient for this purpose, since, at common law, no deed was necessary in order to make a good feofment, when accompanied by a delivery of possession. But where, as was the case at common law in respect to rents and other incorporeal hereditaments, a deed was necessary in order to create a legal estate therein, it required a deed to create or raise a use in the same. But deeds declaring or assigning uses might always be kept secret between the parties in interest. Any instrument declaring the intention of the parties was allowed to be binding in equity, the intention being the leading principle in the rules governing this species of property.[4]

[*100]

15. Not only was the declared intention of the parties thus

[1] Crabb, Real Prop. § 1609; Tud. Lead. Cas. 254.

[2] 1 Spence, Eq. Jur. 435; 1 Cruise, Dig. 341.

[3] 2 Bl. Com. 331; 1 Spence, Eq. Jur. 454; 1 Cruise, Dig. 341.

[4] 2 Bl. Com. 331; 1 Spence, Eq. Jur. 449; Crabb, Real Prop. § 1614.

effectually regarded in creating a use, but in numerous cases equity raised uses where no intention to do so had been expressed. Especially was this the case in respect to what are called Resulting Uses. The difference between common law and equity in this respect was this. By the former, if one made a feofment of his land without fraud, a sufficient consideration was presumed; and if the grant was by deed, it was all the evidence of a consideration that was required.[1] But equity presumed that no man intended to part with a beneficial interest in his estate without some consideration. And if he made a feofment without consideration, and without declaring to whose use the land should be held, equity presumed he intended to reserve the benefit thereof to himself, and accordingly raised a use in his own favor. This was called a *resulting use*, as it resulted back to the feoffor himself.[2] Indeed, so common did uses become, that a conveyance of the legal estate ceased to imply an intention that the feoffee should enjoy the beneficial interests therein. And if no intent to the contrary was expressed, or no consideration was proved or implied, the use always resulted to the feoffor. And if a part only of the use was *expressed, the [*101] balance thereof remained in, or resulted to, the feoffor.[3] So strong was the disposition of chancery to have the use of lands follow the equitable ownership, irrespective of the form in which the legal title to the same stood, that if a person purchased and paid for an estate, and took the title thereof to a third person, a use thereupon resulted in favor of the purchaser, with this exception, that if a father, in the name of a child, purchased an estate, it was presumed to be to the use of the child in the way of an advancement.[4] And it is said that the two cases of resulting uses above mentioned are the only ones known to the law.[5]

[1] Crabb, Real Prop. § 1614; 1 Spence, Eq. Jur. 451; Lloyd *v.* Spillett, 2 Atk. 150; Bac. Law Tracts, 310.

[2] Perkins, § 553; 2 Bl. Com. 331.

[3] 2 Rolle, Abr. 781, F; Co. Lit. 23 a; Lloyd *v.* Spillett, 2 Atk. 150; Bac. Law Tracts, 317; 1 Spence, Eq. Jur. 451.

[4] In New York the same rule applies in favor of a wife, when a husband purchases in her name. Welton *v.* Divine, 20 Barb. 9.

[5] 1 Spence, Eq. Jur. 452; Lloyd *v.* Spillett, 2 Atk. 150.

16. If, however, there was a conveyance of land by feoffment, or in a form which operated a transmutation of the possession from the grantor to the grantee, with a declaration of a use in favor of some third person, the use would be sustained, though no consideration therefor were stated or proved.[1]

17. If a feoffee paid a valuable consideration, however small, for a conveyance, it raised a use in his favor. Nor was it necessary that the consideration should be stated in the deed; for whether any and what consideration was paid might be proved, whether expressed therein or not, unless it was repugnant to that which was expressed.[2] But no use could be averred between the parties contrary to that which was expressed upon the face of the instrument, or was implied by law.[3] Nor where a consideration was expressed could the grantor negative the fact, in order to impeach the [*102] deed, in the absence * of fraud.[4] Considerations were then, as now, divided into two classes, — good and valuable. A good consideration was one raised by the relationship of marriage or of blood, within the degrees of nephew or cousin. A valuable consideration is either money or something that is money's worth. The latter will support a use in favor of a stranger: the former will support one in favor of such relations as are above indicated, if it is declared in a sufficient and proper form.[5]

18. But as equity would not enforce a mere gratuity, if one having the legal interest, without consideration and without a transmutation of the possession of the land, made a declaration of a use in favor of another, equity would not enforce it. But if there was a consideration, a declaration of a use would

[1] Lloyd *v.* Spillett, 2 Atk. 150; 2 Bl. Com. 329; 1 Spence, Eq. Jur. 449; Crabb, Real Prop. § 1614; Calthrop's case, F. Moore, 102.

[2] Crabb, Real Prop. § 1614; 2 Bl. Com. 329; Tud. Lead. Cas. 255; 1 Spence, Eq. Jur. 451. See *post*, p. *134. Wilkinson *v.* Scott, 17 Mass. 257; Morse *v.* Shattuck, 4 N. H. 229; Pritchard *v.* Brown, Id. 397; Shephard *v.* Little, 14 Johns. 210; Griswold *v.* Messenger, 6 Pick. 517; Maigley *v.* Hauer, 7 Johns. 341; Boyd *v.* M'Lean, 1 Johns. Ch. 582.

[3] 1 Spence, Eq. Jur. 451; Lewis *v.* Lewis, 2 Rep. in Chanc. 77; Lewin, Trusts, 27.

[4] 3 Wood, Conv. 285; 1 Greenl. Ev. § 26, note, for the American Law; Wilt *v.* Franklin, 1 Binn. 518.

[5] 1 Spence, Eq. Jur. 450.

be enforced, though it was made by parol, even where there was no transmutation of possession on the part of the one declaring the use.[1] It was upon this principle, as will be shown hereafter, that bargains and sales, and covenants to stand seised, as modes of conveying lands, depended for their origin and validity. And it may also be remarked, in passing, that ordinary deeds in modern use avoid the effect of raising a resulting use in favor of the grantor, first, by inserting therein an acknowledgment of a consideration received by the grantor; and, second, by declaring thereby the uses of the estate granted in favor of the grantee, and, if in fee, of his heirs and assigns.

19. As uses were altogether within the cognizance of chancery, its courts were at liberty to accept or reject the rules of the common law in respect to an entity as abstract as that of a use. In fact, they applied to them the rules of the common law in many respects, and in others they adopted rules more favorable to their easy and unembarrassed alienation.[2] Thus they were descendible like real estate, agreeably to the rules of the common law.[3] But words of limitation to heirs were not * necessary in creating estates of inheritance [*103] in uses. One might have as absolute property in a use without words of inheritance as he could have had in a chattel; and, at his death, the same might go to his heirs like real estate.[4]

20. It will be recollected, that, although lands were devisable by the Saxon laws, they ceased to be so under the feudal system introduced by William. Nor were they again made so by law until the statute of wills, 32 Hen. VIII.[5] But, in chancery, uses were always devisable; and it was in that way that the disability at common law in this respect was obviated. The will of a *cestui que use* was deemed by chancery to be a declaration of the use, and the feoffee to use was accordingly compelled to convey the land to the use as thus declared.[6] Thus, if one seised of lands enfeoffed

[1] 1 Spence, Eq. Jur. 450.
[2] 2 Madd. Ch. 251.
[3] 1 Spence, Eq. Jur. 454; 2 Bl. Com. 329.
[4] Tud. Lead. Cas. 253; 1 Spence, Eq. Jur. 452; 1 Cruise, Dig. 343; Cornish, Uses, 19.
[5] 6 Cruise, Dig. 3, 4.
[6] 2 Bl. Com. 329; Co. Lit. 271 b, Butler's note, 231.

A B of them to the use of the feoffor, the latter might, by his last will, declare this use in favor of any person whom he wished to make his devisee, and equity came in and gave effect to the will accordingly.[1] Or the *cestui que use* might, by his will, devise that the feoffee should convey the estate to the person named as the object of the testator's bounty, and chancery would enforce the direction. So one might make a feofment of his lands to the use of his last will and testament, or of such person as he should appoint by his last will, and the use in the mean time would, in such case, result to himself.[2] These are put by way of illustration, rather than as an enumeration of the modes by which devises of lands might be effected through the intervention of uses, and courts of chancery, before the statute of wills.

21. Uses, in the next place, were alienable, although, in many respects, resembling choses in action which were not assignable at common law.[3] But though usually in [*104] possession of the * lands, the *cestui que use* could not alien the *legal* estate in the same without being joined by his trustee, his possession being regarded in law as a mere tenancy at will under his trustee or feoffee to use.[4] No deed was required in aliening a use, nor any instrument in writing, but merely that there should be a direction from the *cestui que use* to his trustee, since there could be no such thing as a livery of seisin.[5] Or this might be done by any species of deed or writing, and the trustee was bound to obey any direction he should receive immediately from his *cestui que use*.[6]

22. Though the most usual mode, perhaps, of separating the use from the legal estate, was by feofment to use, there were, as has already been mentioned, methods of doing this

[1] 2 Bl. Com. 329.

[2] Crabb, Real Prop. § 1616; Co. Lit. 112, 138; Co. Lit. 271 b, Butler's note, 231; Sir Edw. Clere's case, 6 Rep. 17; Co. Lit. 112 a, n. 142; Tud. Lead. Cas. 268.

[3] Cornish, Uses, 19.

[4] 2 Bl. Com. 331.

[5] 1 Spence, Eq. Jur. 454; Crabb, Real Prop. § 1614.

[6] 1 Cruise, Dig. 342. By the seventh section of the statute of frauds, 29 Car. II. c. 3, all declarations or creations of trusts or confidence were, for the first time, required to be proved by some writing.

by conveying the use, separate and distinct from the legal estate, by one who had them united in himself. Thus, where the owner of land contracted to sell or lease it for a valuable consideration paid him, chancery regarded him as a trustee, holding the estate to the use of the bargainor, in fee or for years, according to the terms of the agreement, though no deed had passed, and no words of inheritance were made use of in making the bargain. And the same effect was given to an agreement to settle an estate for the benefit of a blood relation, without any valuable consideration being paid; chancery treating the holder of the land, in such case, as a trustee of the person on whom he agreed to settle it, without requiring any formal conveyance to be made. By holding the person to whom the legal estate belonged, in the above cases, to be a trustee of the party to be benefited, chancery was able to carry out the agreement, though the common law did not regard it as a binding contract, and no trust had been formally declared. The use became separated from the legal estate, and became the subject of transfer by itself, as has heretofore been stated.[1] Nor did chancery stop
* there, but held the person in whom was the legal [*105]
estate trustee of whoever was entitled to it, in all cases where such estate had been acquired by fraud or accident.[2]

23. A use, when once raised, might be granted or devised in fee, in tail, for life or for years.[3] Uses might also be raised or created in favor of the person intended to have the benefit thereof, in various modes unknown to and at variance with the common law; as, for instance, in favor of one not a party to the deed conveying the estate.[4] So a fee might be limited to one, which, upon the happening of some event, should shift over to another in fee.[5] Or the use might be limited to spring up and take effect as a freehold estate *in futuro*.[6]

[1] 1 Spence, Eq. Jur. 452, 453. It is hardly necessary to add, that these modes of transferring a use gave rise to the conveyances under the statute by bargain and sale, and covenant to stand seised, and the like.

[2] 1 Spence, Eq. Jur. 453.

[3] 1 Spence, Eq. Jur. 455.

[4] Bac. Law Tracts, 310, 311; 1 Cruise, Dig. 343; 1 Spence, Eq. Jur. 455; Cornish, Uses, 19.

[5] Gilbert, Uses, Sugd. ed. 153, 154; Cornish, Uses, 19.

[6] Gilbert, Uses, Sugd. ed. 161.

This was the origin of shifting and springing uses, as at present applied. So there might be a limitation of a contingent use by the way of remainder in fee to a person not yet born or ascertained, without creating at the same time a previous particular estate of freehold to sustain it, which, as will be shown, was necessary in such limitations at common law.[1] Or it might be so limited that the grantor might reserve to himself or a stranger a right, at a future time, to revoke the use which he then declared, and to limit or declare new uses in favor of other persons,[2] which became the origin of the present doctrine of powers. And, in general terms, the use might be limited as a freehold to commence *in futuro*, which could not be done at common law.[3]

24. But it should be observed, that all these things [*106] might * have been done before the statute, without doing violence to any rule of the common law as to the seisin of a freehold in the legal estate, since the limitation of uses was but a direction in equity to the feoffee or trustee who continued to hold the seisin and fulfil the tenure of the legal estate; and that was all that was heeded by the common law.[4]

25. Among the peculiarities in conveyances of uses, as compared with those of estates at common law, was this, that a husband might create a use in favor of his wife, out of his own estate, by enfeoffing another to her use, or by a covenant with another to stand seised to her use.[5] So uses might be raised in favor of several persons, to come into the enjoyment thereof at successive periods, and yet all be joint-tenants thereof, as soon as the use should take effect.[6]

26. Such of the incidents of common-law estates as grew out of the doctrine of feudal seisin and tenure could not obviously have belonged to uses, since seisin could not be

[1] Shelley's case, 1 Rep. 101; Gilbert, Uses, Sugd. ed. 164; Cornish, Uses, 19. But a different rule prevails under the statute. Gilbert, Uses, Sugd. ed. 165; Adams *v.* Savage, 2 Salk. 679; Chudleigh's case, 1 Rep. 135; Fearne, Cont. Rem. 284; *post*, p. *126.

[2] 1 Spence, 455; Gilbert, Uses, Sugd. ed. 165; Tud. Lead. Cas. 254.

[3] 1 Cruise, Dig. 343.

[4] 1 Spence, Eq. Jur. 455.

[5] 1 Spence, Eq. Jur. 456; Co. Lit. 112; Thatcher *v.* Omans, 3 Pick. 521.

[6] Spence, Eq. Jur. 456.

predicated of a mere ideal abstraction, impalpable to the senses, and known only to equity. A *cestui que use* could not, accordingly, be disseised, or dispossessed of his use by another. So neither curtesy nor dower could be had in a use. This led to the introduction of jointures, as has already been stated.[1] Nor were uses subject to the burdens of tenure, nor to be levied upon for the debt of the *cestui que use*. Nor could purchasers, either from feoffees or *cestuis que use*, be assured of a title to what they purchased.[2] Another incident of uses was that, at common law, like conditions or mere rights of action, they were not forfeited to the king upon attainder of treason, notwithstanding such attainder extended to lands and tenements. This led to the statute of 33 Hen. VIII. c. 20, § 2, whereby uses, rights, conditions, &c., are declared forfeited upon attainder for treason.[3]

27. It may be proper to remark, that the remedy which a *cestui que use* had, in order to compel the execution of the use in his favor by the feoffee, was only by appeal to chancery, since the common law would not interpose to aid him; and the mode by which this was enforced was by imprisoning the *delinquent party, and detaining him in prison [*107] till he complied with the order of the chancellor.[4]

28. In considering how a use might be lost or defeated, it should be borne in mind that it depended upon a privity of estate between the feoffee and *cestui que use* in respect to the lands out of which the use was to arise, and a privity of person also, or a confidence between these parties touching the land.[5] If, then, this privity were destroyed between him who held the seisin or possession of the land and him who claimed the use, the use was defeated or suspended, as the case might be, until the privity was restored. And it should be remembered, that, as to all the world but the *cestui que use*, the feof-

[1] *Ante*, vol. 1, p. *263.

[2] Bac. Law Tracts, 330; 1 Spence, Eq. Jur. 456, 460; Gilbert, Uses, Sugd. ed. 137; 2 Bl. Com. 331; Cornish, Uses, 20; Perkins, § 457; Crabb, Real Prop. § 1618.

[3] Jackson *v.* Catlin, 2 Johns. 261; 3 Inst. 19; Stat. at Large. See the text. Chudleigh's case, 1 Rep. 121; Tud. Lead. Cas. 253.

[4] Chudleigh's case, 1 Rep. 121; Tud. Lead. Cas. 253.

[5] Gilb. Uses, Sugd. ed. 376; Lewin, Trusts, 2; Tud. Lead. Cas. 254; Co. Lit. 272 b, Butler's note, 231, § 2.

fee was the real owner of the fee to all intents, so that his wife was entitled to dower, his lord to his escheat, and the like: if, therefore, the feoffee were disseised, or an abator entered, or a tenant in dower, or by curtesy, or *elegit*, or a purchaser without notice and for a valuable consideration, became possessed of the land, the privity of the feoffee with the *cestui que use* as to such tenant was destroyed, and the use was lost. But if the tenant came in under the feoffee, as by descent or by purchase, with a knowledge of the use, or without having paid a consideration, there would still be such a privity and confidence between him and the *cestui que use* that the use would be saved, and chancery would compel its execution.[1]

29. The language of Baron Gilbert, in his treatise on Uses above cited, contains perhaps as clear an explanation of this subject as can readily be found. "It may be asked what this privity of estate is that is requisite to the standing seised to a use? And it is where a person comes into the same estate as the feoffee to uses had in and by contract with him; for a disseisor comes into the same estate, but not by contract and agreement, and therefore he is in the *post*, i. e. claims [*108] not by or * from the feoffee. And why a privity of estate is requisite to the standing seised to a use, in general, is because he who comes not in privity of estate claims not the estate by and from the feoffee who stood seised to the use, and consequently claims not the estate, as it was subject to the uses, but one above that, free and clear." — "Why should a man stand seised to a use when he claims not the estate by agreement with him that did stand seised, or has not the estate that was charged to the use? for confidence in the person is as well requisite as privity of estate." — "Confidence in the person is either express or implied; and if that fails, the use is gone; as if a feoffee to a use for a good consideration doth enfeoff one who hath not notice of the use, the use is gone, for here is no trust in him." — "But if he had

[1] 1 Spence, Eq. Jur. 456; Hopkins *v.* Hopkins, 1 Atk. 581; Cholmondeley *v.* Clinton, 2 Meriv. 358, 360; Crabb, Real Prop. § 1606; Cornish, Uses, 17; Lewin, Trusts, 3, 4; Burgess *v.* Wheate, 1 W. Bl. 156; Chudleigh's case, 1 Rep. 120, 122 b; Co. Lit. 271 b, Butler's note, 231, § 2; Gilb. Uses, Sugd. ed. 377, 378.

notice, a trust might well be said to be reposed in him, because he took the land knowingly with the uses." The reader will hereafter remark the similarity of the old law of uses in this respect and the modern law of trusts. Attempts were made from time to time, by legislation in England, to obviate some of the mischiefs which were supposed to result from the multiplication of secret trusts, subject to which the lands of the kingdom were held. Among the acts passed for that purpose were the statutes 2 Rich. II. c. 23, 15 Rich. II. c. 5, 1 Rich. III. c. 1, and 50 Edw. III., to which the reader may refer. But these all gave place to the famous statute of 27 Hen. VIII., called "The Statute of Uses," which will be found treated of in the next section.

SECTION II.

USES UNDER THE STATUTE 27 HENRY VIII.

1. Purposes of the statute.
2. Effects produced by the statute.
3. The passage and provisions of the statute.
4. Effect of the statute upon devises.
5. Principles and rules applied in construing the statute.
6. Three things must concur to give the statute effect.
7. Who may be seised to a use.
8. What property is within the statute.
9. Of the quantity of estate of a feoffee to uses.
10. Effect of feoffee and *cestui que use* being the same.
11. *Cestui que use in esse* essential.
12. Who may be *cestui que use*.
13. How limitations made to *cestui que use*.
14. Terms by which uses are created.
15. Where feoffee may take as *cestui que use*.
16. Conveyance of estate by uses, though not good at common law.
17. Contingent remainders by way of uses.
18. A use *in esse* necessary.
19. When a use is said to be *executed*.
20. Seisin transferred by executing a use.
21. Statute guards against merger as to feoffee.
22. Union of common law with uses by the statute.
23, 24. Freeholds *in futuro* raised by uses.
25. As to freeholds *in futuro* by bargain and sale.
26. Of powers reserved by means of uses.
27. Of *scintilla juris* and seisin to sustain uses.
28. Of future and contingent uses.
29. Of estate affected by union of seisin and use.
30. When a contingent use or a remainder must vest.
31. Of the enrolment of deeds of bargain and sale.
32–35. Of the modes of conveying lands by means of uses.
36. Of the considerations for bargain and covenant to stand, &c.
37. An executory covenant not a conveyance.
38. Conveyance by lease and release, history and form.
39. Lease and release in use in United States.
40. Requisite formalities in declaring uses.
41, 42. Of resulting uses, when raised by law.
43. What consideration prevents the resulting of a use.
44. Declaration of a use prevents a resulting one.
45. Of uses "by implication of law."
46. Uses only result to the original owner.
47. Effect of limiting a use in the same way it would result.
48. Presumption of a resulting use rebutted by evidence.
49. No use results where one is expressly limited.

1. THE purpose of the statute of uses is said, by some authors, to have been entirely to abolish uses.[1] Another writer states it to have been to abolish altogether the jurisdiction of the court of chancery over landed estates;[2] while Bacon, and in this * he is sustained by Mr. Sug- [*109] den and others, maintains the same idea by insisting that the purpose was to turn equitable into legal estates.[3]

2. Whatever may have been the intention of the framers of the statute, its practical effect, under the construction given to it by the courts both of law and equity, was to produce a great revolution in the transfer and modification of landed property; and while it accomplished on the one hand the idea of turning equitable into legal estates, it instituted on the other a complete system of equitable estates, more efficient, if possible, than that which it professed to abolish.[4] And, as the subject develops itself, it will be found to justify the language of Lord Bacon, that "it is the statute which of all other hath the greatest power and operation over the heritages of the realm," whether the reader coincides or not in what he adds: "In itself it is most perfectly and exactly conceived and penned of any law in the books."[5] Mr. Williams, however, remarks that "all that was ultimately effected by the statute of uses was to import into the rules of law some of the then existing doctrines of the courts of equity, and to add three words, *to the use*, to every conveyance."[6] And Lord Hardwicke says: "A statute made upon great consideration, introduced in a solemn and pompous manner by a strict construction, has had no other effect than to add at most three words to a conveyance."[7] Yet the language of Mr. Preston is not too strong when he says: "Within the whole scope of the learning more peculiarly belonging to the province of the conveyancer, none is more important to be

[1] 1 Cruise, Dig. 349; Gilb. Uses, 74; Chudleigh's case, 1 Rep. 124; Co. Lit. 271; Butler's note, 231, § 3.

[2] Wms. Real Prop. 133.

[3] Bac. Law Tracts, 332; Gilb. Uses, Sugd. ed. 139, note; Sand. Uses, 86, 87.

[4] Tud. Lead. Cas. 257; Co. Lit. 271 b, Butler's note, 231, § 2; 1 Prest. Abst. 311.

[5] Bac. Law Tracts, 324.

[6] Wms. Real Prop. 133.

[7] Hopkins *v.* Hopkins, 1 Atk. 591. But see Sand. Uses, 265.

known than that which concerns the doctrine of uses; for there are many things which may be done through the medium of a conveyance to uses which cannot be accomplished by a conveyance merely and simply at the common law."[1]

[*110] *3. The act bears date A. D. 1535, and forms the tenth chapter of the statute 27 Hen. VIII. But it was many years before the courts had wrought out from it, by construction, the modern system of trusts and conveyances. Bacon remarks, that "the law began to be reduced to a true and sound exposition" in Chudleigh's case, 37 Eliz. (A. D. 1595).[2] Lord Nottingham, who was Chancellor in 1676, is said to have done much in placing trusts upon their true foundations.[3] It is easy, therefore, to understand the applicability and force of the language of Lord Bacon, who was Chancellor in 1617, where he describes it as "a law whereupon the inheritances of this realm are tossed, at this day, like a ship upon the sea, in such sort that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances will stand good, and what will not."[4] The act contains a preamble and eighteen sections, and is styled "An Act concerning Uses and Wills." The preamble recites, that, by common law, lands, &c., are not devisable, and ought not to be transferred but by solemn livery, matter of record, &c., without covin. Yet by subtle inventions, &c., they have been conveyed, &c., by assurances craftily made, and secret uses, interests, and trusts; and also by wills, sometimes by words, sometimes by writing, by reason of which heirs have been disinherited, lords have lost their wards; marriages, aids, &c.; persons purchasing lands could not know their title; husbands lost curtesy, widows dower, the king had lost the profits of attainder, &c., "to the utter subversion of the ancient common law of this realm." It then, "for the extirping and extinguishment of all such subtle practised feofments," "to the intent that the king's highness, or any other, his subjects of this realm, shall not in any wise hereafter, by any means or inventions, be deceived, damaged, or hurt by reason of such trusts, uses, or confidences," pro-

[1] 2 Prest. Conv. 474.
[2] Bac. Law Tracts, 300.
[3] 1 Spence, Eq. Jur. 494.
[4] Bac. Law Tracts, 299.

ceeds to enact, that when any persons stand seised, or shall happen to be seised, of or in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the * use, confidence, or trust [*111] of any other person, &c., such person shall stand and be seised of such hereditaments, to all intents and purposes in the law "of and in such like estates, as they had or shall have in use, trust, or confidence in the same; and that the estate, right, and possession of the person seised shall be deemed and adjudged to be in him or them that have such use, confidence, or trust, *after such quality, manner, form*, and *condition* as they had before in or to the use, &c." This summary of the preamble and first section of the act presents an outline of the reasons for, and the intention of, its enactment, and contains the main and essential change proposed by the law. This feature of the act is said to have been adopted from a hint of the judges under Henry VIII., when he was complaining to them of his loss of wardships, &c., by the means of uses, that, if possession were joined to the use, "all would go well."[1] Bacon, however, thinks the hint may also have been borrowed from two decrees of the Roman senate, making *cestuis que use* the heirs, in substance, of the estate.[2]

4. The simple remedy proposed for the long train of evils recited in the preamble was to destroy the estate of the feoffee to use, and to transfer it by the very act that created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use*. But it became necessary, in order to guard against widows of *cestuis que use* taking dower in addition to their jointures where those had been settled upon them, as was explained in a former chapter, to insert a clause to that effect (§ 6).[3] As, by the form of this statute, the seisin by which alone the use could be supported was taken out of the feoffee, and passed at once to the *cestui que use*, it ceased to be possible to devise lands in any of the forms mentioned in a former section; and they, in fact, thereby became un-

[1] Brent's case, 2 Leon. 16, 17; Sand. Uses, 70. [2] Bac. Law Tracts, 315.
[3] *Ante*, p. *106, vol. 1, p. *263; Bac. Law Tracts, 344.

devisable, and remained so until the statute of wills, 32 Hen. VIII.[1]

[*112] 5. * It might have been supposed, that, as the statute was a remedial one, it would have received a liberal construction, with a view of carrying out the professed objects stated in the preamble; whereas, in fact, the opposite course was adopted, and a strict construction was insisted upon. And, among other things, the judges pretended that the statute did not apply to secondary uses, or a use upon use, and by this means allowed parties at pleasure to evade the statute, till, instead of courts of equity being deprived of jurisdiction over lands, the chief control of real property was practically transferred to those very courts;[2] which has led to a just remark of Mr. Sugden, that "this should operate as a lesson to the legislature not vainly to oppose the current of general opinion; for, although diverted for a time, it will ultimately regain its old channel."[3] The first thing that strikes one on examining the statute is, that it retains in full vigor the idea of a legal seisin of the estate, in the same manner as it had existed at the common law, and, at the same time, expressly recognizes the existence and continuance of the very something, called a *use*, which it is said to have aimed to destroy. And the operation of the statute was to be effected by uniting these two entities; fusing them, as it were, into one legal entity or estate. In the words of Lord St. Leonards: "When the statute of uses came, and made uses possessions, and gave to the equitable owner, to him who had the use or benefit, the legal estate, it was a simple transfer, by the force of the statute, of the legal estate which we call the *seisin*, to serve those uses. What did the contingent use then become? It did not alter its character, except in this respect, that the legal estate was carried to it, and so it was made in that sense a contingent estate."[4] Whatever this estate was, it should be remembered, it was *to be held after such quality, manner, and form and condition*, as the owner of the use had before had in and to the use, which

[1] Bac. Law Tracts, 344.
[2] 1 Rep. Eng. Com. Real Prop. 8.
[3] Gilbert, Uses, Introd. lxiii.
[4] Egerton *v.* Brownlow, 4 H. L. Cases, 206.

now drew to itself the legal seisin by force of the statute; thus *executing the use*, as it was called, in him who was to have the entire estate. The consequence, as will be seen, was that it suggested and supplied the means of transferring the legal estates in lands without any such solemnity or notorious act as the common law had required.[1] The doctrine of uses, drawing to them the legal estate of the owner who created or declared them, is not limited to freeholds, but extends to terms for years, where the use draws to it the *possession* only, and not the *seisin*, but in such a manner that the "estate, title, right, and possession that was in such persons that were seised of lands, &c., to the use of any such persons, shall be adjudged to be in him or them that have such use," after such quality, manner, &c., as they had before in or to the use. And it was by carrying out this idea of creating an estate for a year by bargain and sale, whereby a use, for that time was raised in favor of the bargainee, to which the statute annexed the possession, and thereby created a legal estate for that term, that the mode of conveying lands, long in use in England, by lease and release, became effectual; for, in the words of Burton, the statute of uses "converts all vested uses at once into estates."[2] The English Commissioners on Real Property, in their report, in view of the effect above spoken of, state that the statute failed to correct the practice of having two estates, the one legal in one man, and the other equitable in *another, by attempting to do too much. It made no distinction between active, passive, and constructive trusts, and stopped short of authorizing directly the modifications of property and its transfer, which had been effected through uses, and were required by the wants of mankind.[3] [*113]

6. In order to bring an estate within the operation of this statute, so as to execute the use in respect to the same, there must be a concurrence of three things: *first*, a person *seised* to a use; *second*, a *cestui que use in esse;* and *third*, a use *in esse*, either in possession, reversion, or remainder.[4]

[1] Bac. Law Tracts, 327.

[2] 1 Spence, Eq. Juris. 464, 477; Wms. Real Prop. 151; Burton's Comp. 50.

[3] Pelham's case, 1 Rep. Eng. Com. Real Prop. 8.

[4] 1 Cruise, Dig. 349; Tud. Lead. Cas. 258; Crabb, Real Prop. § 1646.

7. First, as to who may be seised to a use. It may be stated, in general terms, that all *persons* may be seised to a use, including *femes covert* and infants, who might have been so seised before the statute, but none other. The words in the statute are "person" or "persons." But aliens and corporations were excluded, although a use would not be void, because the feoffee to such use was an alien.[1] But, in the United States, the word "persons" includes bodies corporate; and corporations may accordingly be seised to a use or trust, if the same is not foreign to the purposes of their creation.[2] But a person uncertain, it is said, is not within the statute, being incapable of having a use executed through him in respect to an estate. Thus, if I give land to J. S., the remainder to the heirs of J. D., to the use of J. N. and his heirs, J. N. is not seised of the fee-simple of an estate during the life of J. S. till J. D. be dead, and then he would take a fee-simple.[3]

8. In respect to what kind of real property or estate is within the statute, it may be stated in general terms that the statute embraces every kind of real property, whether [*114] in possession, * reversion, or remainder, as well incorporeal as corporeal. But it is essential that it should be an estate of which the grantor has, or is entitled to have, the seisin at the time of his grant. No use, therefore, could be raised by a covenant to stand seised of land, of which the covenantor is not at the time seised.[4] And it was accordingly held that a mortgagee could not devise his mortgage interest to uses, so as to be executed by the statute, since the debt was the principal thing, and the mortgage lien would follow the debt to whomsoever that went.[5] In other words, no one can

[1] 1 Cruise, Dig. 349; Bac. Law Tracts, 334, 347, 348. And although, if an infant was feoffee to his own use for life, with a remainder to the use of J. S., he might, on arriving at age, disagree as to his own use, he could not, by such dissent, divest the rights of the remainder-man. Bac. Law Tracts, 348.

[2] United States *v.* Amedy, 11 Wheat. 392; Sutton *v.* Cole, 3 Pick. 240.

[3] Bac. Law Tracts, 349. The simple reason for this would be, that, so long as J. D. lived, no one could be his heir, and consequently there was no one to act as the medium through whom the seisin was to pass to J. N.

[4] 1 Cruise, Dig. 353; Tud. Lead. Cas. 259.

[5] Merrill *v.* Brown, 12 Pick. 220; Galliers *v.* Moss, 9 B. & C. 267.

convey a use in land of which he is not seised in possession, or to which he is not entitled in remainder or reversion, at the time of making the conveyance. And the reason is quite obvious. There must be a seisin *in esse* to pass simultaneously with the use, which the statute can take, and unite with the use, whenever a conveyance is made, in order to bring it within the terms of the statute ; [1] the seisin of the remainderman being in the tenant of the particular estate, if a freehold, for his benefit. This would exclude annuities, as well as uses themselves; so that, as a use cannot be united to a use, it became an axiom of great importance in shaping and adjusting the bearing and application of the statute, that "a use cannot be limited upon a use." [2]

9. In respect to the quantity of the estate which a feoffee must have in order to give effect to the statute, it was at first understood to require a fee-simple, but it was afterwards held that a freehold estate was sufficient, excluding all chattel interests in lands,[3] such as leaseholds and copyholds.[4] A tenant for life, therefore, may be seised to uses, and so may a tenant in tail.[5] But the use to which it is held can be of no larger estate or longer duration than that of the feoffee, since, without a seisin to sustain it, a use cannot subsist; and if the estate of the feoffee be for life only, though in terms to the use of another *and his heirs, the estate in the use [*115] terminates with that of the feoffee.[6] But a tenant in tail is so far seised of the inheritance, that he may be seised to a use in fee-simple.[7]

10. It may be observed, in this connection, that if the feoffee and *cestui que use* be the same person, he never takes under the statute, but at the common law, unless there is some impossibility in the way of his thus taking.[8] The fore-

[1] 1 Cruise, Dig. 353.

[2] Bac. Law Tracts, 335. See, as to rents, Gilbert, Uses, Sugd. ed. 194, n.; Gilbertson *v.* Richards, 5 H. & N. 454; Franciscus *v.* Reigart, 4 Watts, 118.

[3] 1 Cruise, Dig. 350; Bac. Law Tracts, 335. [4] Tud. Lead. Cas. 257.

[5] 1 Cruise, Dig. 351.

[6] Jenkins *v.* Young, Cro. Car. 230; Bac. Law Tracts, 339; Sand. Uses, 109; *ante*, vol. 1, p. *57; Crabb, Real Prop. § 1646; 1 Cruise, Dig. 353; Tud. Lead. Cas. 259.

[7] 1 Cruise, Dig. 352. [8] Bac. Law Tracts, 352; 2 Prest. Conv. 481.

going doctrine may be illustrated by the case of an estate limited to A, and B his wife, *habendum* to them, to the use of them and the heirs of their two bodies; and a question was raised whether the use limited did not exceed the legal estate which was to support it in A and B. It was held to be in effect a limitation of the estate to A and B, and the heirs of their two bodies, at common law. And one reason for this was, that, in order to have a use so limited as to take effect under the statute, it must be to some other person than the one who is seised. In other words, if the one who is seised is to have the use, he simply takes the estate at common law.[1] The exception, if it be such, to this rule, is, that if the feoffment be to A and his heirs, to the use of him and the heirs of his body, it is held to take effect under the statute, and to be executed in A for the benefit of his issue in tail.[2]

11. What has been said leads to the second proposition above made, that, in order to have an estate take effect under the statute, there must be a *cestui que use in esse*. And if an estate is limited to the use of some one not *in esse*, or capable of being ascertained, the statute cannot have any operation until the *cestui que use* comes into being, or is ascer-
[*116] tained, and in the * mean time the use will remain in the original grantor, waiting to be executed by the statute whenever there shall be a *cestui que use* to take it.[3] And upon the same principle, where a use has been limited by deed and it expires, or cannot vest in the *cestui que use* named, it results back to the one who declared it.[4]

12. In respect to those who may be *cestuis que use*, there seems to be no limitation; even corporations not being excluded.[5]

[1] Jenkins *v.* Young, Cro. Car. 231; Co. Lit. 271 b, Butler's note, 231; 1 Cruise, Dig. 354; Tud. Lead. Cas. 257; 2 Booth, Cas. in Eq. 294; Sammes' case, 13 Rep. 56; Jackson *v.* Cary, 16 Johns. 302; 2 Prest. Conv. 481.

[2] 1 Cruise, Dig. 357; Sammes' case, 13 Rep. 56.

[3] Chudleigh's case, 1 Rep. 126; 1 Cruise, Dig. 354; 2 Bl. Com. 336; Bac. Law Tracts, 350; Reformed Dutch Church *v.* Veeder, 4 Wend. 494; Shapleigh *v.* Pilsbury, 1 Me. 271; Sewall *v.* Cargill, 15 Me. 414; Ashhurst *v.* Given, 5 Watts & S. 323; Hayes, Real Est. 64; Miller *v.* Chittenden, 2 Iowa, 371; *post*, p. *198.

[4] Jackson *v.* Myers, 3 Johns. 388.

[5] Cruise, Dig. 354; Bac. Law. Tracts, 350.

13. In limiting estates to *cestuis que use*, the same terms are requisite under the statute to create a fee or a freehold, or the like, as were necessary in a conveyance at common law; consequently no fee-simple in uses can be created by deed without the word "heirs."[1] And where an estate was limited to the use of J. S. and his heirs male, it was held to be an estate in fee-simple, because at common law, as heretofore shown, such a limitation would create a fee-simple, there being no words of procreation indicating the body from which the heirs were to proceed.[2] But a use may be limited in fee-simple or fee-tail, for life or years, or in remainder, or reversion.[3] And a limitation by deed to the use of J. S. and the issue male of his body is neither an estate tail nor a fee-simple for the want of the word "heirs." It is a mere life estate.[4]

14. As to the words necessary in a conveyance to declare or create a use in another in respect to that which is conveyed to the feoffee, the words of the statute are "*use*, *confidence*, *or* * *trust*." But it would be sufficient if the words used clearly indicated an intention to create a use, although not those found in the statute.[5] [*117]

15. There are many cases where one may take as *cestui que use*, although he is named also as feoffee, notwithstanding the strong terms in which the law holds an estate limited to one to his own use and that of his heirs to be an estate at common law. Such would be the case if the seisin and use did not vest equally and alike in the same person. The limitation might be good under the statute in passing the estate by executing it in the *cestui que use*, provided such was the intention of the parties. Thus, where several persons are seised to the use of one of them, the estate is executed according to the use. So if the estate be limited to A B and his heirs, to the use of him and the heirs of his body, it will be executed in the use as an estate tail. So an estate to A to the use of

[1] Tud. Lead. Cas. 261; Sand. Uses, 122; Gilbert, Uses, Sugd. ed. 143; Tapner *v.* Merlott, Willes, 180.

[2] Abraham *v.* Twigg, Cro. Eliz. 478; Gilbert, Uses, Sugd. ed. 143; *ante*, vol. 1, pp. *61, *74.

[3] 1 Cruise, Dig. 354. See Stat. 27 Hen. VIII., c. 10, § 1.

[4] Nevell *v.* Nevell, 1 Rolle, Abr. 837, R. 1; Sand. Uses, 123.

[5] Tud. Lead. Cas. 258; Boydell *v.* Walthall, F. Moore, 722.

A and C and their heirs, it was held they were joint-tenants, and that A did not take a half as tenant in common by the common law, but the whole estate was executed in the use according to its intent, being an estate in joint-tenancy.[1] So, "if J. enfeoff J. S. to the use of J. D. for life, then to the use of *himself* for life, with remainder to the use of J. N. in fee, the law will not admit fractions of estates, but J. S. is in with the rest by statute." "So if J. enfeoff J. S. to the use of himself and a stranger, they shall both be in by the statute, because they could not take jointly, taking by several titles." [2]

16. Among the instances and illustrations of accomplishing the conveyance of an estate by the use being executed in the *cestui que use*, which could not be done directly at common law, is that of a conveyance by a husband to his wife. At common law, such a deed would be void. But by a feofment or covenant to stand seised made by a husband to a third person, to the use of his wife, the estate would be [*118] executed in the use, and * made effectual by the statute.[3] So where A conveyed to B, to the use of A and his wife for life, remainder to the use of C and D and their heirs, it created an executed estate to A and his wife jointly for life, and a vested remainder in fee to C and D.[4] So one having a mere seisin of lands in fee may convey them to B, to the use of himself for life, or to the use of himself and B for life, with remainder to A in tail, and the conveyance be good under the statute.[5] So if lands be conveyed to A and his heirs, to the use of B and his heirs, the entire estate is executed in B by the statute; and if, instead of its being to the use of B and his heirs, it had been to the use that B should receive the rents and profits during life, B would, in such case, be seised of an executed estate for life, according to the use as declared.[6]

[1] Sammes' case, 13 Rep. 55; 1 Cruise, Dig. 357.

[2] Bac. Law Tracts, 353; Tud. Lead. Cas. 258; Sand. Uses, 94–96.

[3] Thatcher *v.* Omans, 3 Pick. 521; Martin *v.* Martin, 1 Me. 394; 1 Cruise, Dig. 354; Tud. Lead. Cas. 262; Co. Lit. 112 a; Bedell's case, 7 Rep. 40.

[4] Johnson *v.* Johnson, 7 Allen, 197.

[5] Tud. Lead. Cas. 261.

[6] Tud. Lead. Cas. 358; Right *v.* Smith, 12 East, 455.

17. To show the tendency of the courts to apply the rules of the common law to the limitation of estates under the statute of uses, it may be proper, though somewhat anticipating, to refer to the case of what is called a contingent remainder. It may be stated, that as at common law there must be, with very few exceptions, some one in whom the seisin of an estate rests, if an estate is limited in remainder to a person not yet *in esse*, as to the oldest son of A B, who has none, or the heirs of C D, who is living, and whose heirs cannot therefore be ascertained, it is a contingent one, and requires that there should be some one to whom a freehold estate should be limited at the same time that the remainder is created, as to A B for life, remainder to the heirs of C D, who is then living. And if there be no prior estate to sustain such remainder, or it is one for years only, which would not sustain the remainder, it would accordingly fail altogether. The same rule applies to contingent remainders limited by way of use. Thus if a grant of a wife's estate was made by the husband and wife to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband, there would be no difficulty in such a case in finding a life estate to sustain the remainder so long as the wife lived, for the use *resulted* to her, as she had never * parted with it. But, she dying before [*119] her husband, the limitation to the right heirs of the husband became void; for the remainder was contingent while he lived, and there was no estate to sustain it after her death.[1] So where a grant was made to the use of the grantor for seventy years, if he so long lived, remainder to the heirs male of his body, it was held, that, as a limitation of a contingent remainder in favor of the heirs of his body, it was void, because the prior estate in the use in himself was one for years.[2] Though there are cases where, if the use of the prior estate be limited to a third party and not to the grantee, and is for years, and there be a use by way of contingent

[1] Davies *v.* Speed, 2 Salk. 675; Fearne, Cont. Rem. 284, n.

[2] Rawley *v.* Holland, 2 Eq. Cas. Abr. 753; Adams *v.* Savage, 2 Salk. 679; Tud. Lead. Cas. 261; 1 Prest. Est. 195; Fearne, Cont. Rem. 284; 1 Spence, Eq. Jur. 504.

remainder, dependent upon the death of the grantor, the remainder will be sustained by an implied or resulting use to the grantor for life, after the use for years which has been thus expressly limited.[1] The difference between the two cases being, that in the first the law would not imply a use for life when the express limitation was seventy years; and in the second, as only a limited number of years was granted to another, all that remained between the end of that term and the taking effect of the remainder over at his death resulted to him who created it, whereby a succession of vested estates, taken together, supplied collectively a complete estate between the taking effect of the grant and the final vesting of the contingent remainder.

18. The third requisite to bring a case within a statute is, that there be a use *in esse*, either in possession, reversion, or remainder, though it is immaterial whether this use is created by express declaration, or results or arises by implication of law.[2]

19. If, therefore, these three things concur, namely, [*120] a person * seised to a use, a *cestui que use*, and a use *in esse*, the use is said to be *executed*. And if the use declared be not *in esse* at the time, it cannot be executed until it comes *in esse*. The consequence would be, that if, in the mean time, the feoffee is disseised, or parts with his seisin to a stranger without notice of the use, and for a valuable consideration, the seisin will be wanting if the use comes *in esse*, and it therefore can never be executed in the *cestui que use*.[3] And in growing out of this capacity in a use of being executed when it comes *in esse*, though subsequent to its being declared, a principle is applied in respect to creating a joint-tenancy in a use, which is different from that of the common law. An estate may be limited to several as joint-tenants by the way of use, and may be executed in

[1] Beverly *v.* Beverly, 2 Vern. 131; 1 Prest. Est. 197. Although it is not proposed to explain here how it may be done, it seems proper by way of anticipation to say that limitations like those above mentioned, which are future and contingent, may, under some circumstances, be good by the way of springing uses or executory devises. Sand. Uses, 142, 143; Hayes, Real Est. 67.

[2] Chudleigh's case, 1 Rep. 126; 1 Cruise, Dig. 358.

[3] Chudleigh's case, 1 Rep. 126.

them in succession, one after the other, instead of taking effect at one and the same time, as is required by the common law. Thus, in a limitation to the use of A and any wife he should marry, the use would be executed in A alone until he married, when it would also be executed in his wife as joint-tenant with him.[1]

20. The effect of a use being executed in the *cestui que use*, as above explained, is, that the statute comes in and actually transfers the seisin and possession from the feoffee to use to the *cestui que use*, to all intents and purposes, without any actual entry being necessary to give him the seisin. It is not merely a title, but an actual estate, which is thus created in the *cestui que use*, as effectually as if it had been done by a conveyance with livery of seisin at common law.[2]

21. The statute, it will be perceived, recognizes both the common law and the existing law of uses, and is careful to guard against their conflicting with each other, wherever it did not intend to restore the common law by extinguishing uses. Thus, at common law, if one having a lesser estate, a term for years, for example, were to become vested with a greater one, as a fee, for instance, his lesser would merge in his greater * estate. And if, in a case like [*121] this, one who had a term for years had been made feoffee in fee to the use of another, the effect might have been first to merge his own estate into that held by him as feoffee, and next to transfer that, by force of the statute, to the *cestui que use*, and thus destroy his own estate altogether. The third section of the statute guards against such a consequence by declaring that it shall not have that effect.[3] And, as has already been stated, the courts, in construing the statute, required the rules of the common law to be observed in regard to the words requisite to create estates of inheritance in conveyances to uses.[4]

22. But this recognition by the statute of both the common

[1] Tud. Lead. Cas. 262; Bac. Law Tracts, 351.

[2] Bac. Law Tracts, 338; 1 Sand. Uses, 119; Anonymous, Cro. Eliz. 46; 1 Cruise, Dig. 358; Tud. Lead. Cas. 260; Co. Lit. 266 b; Barker *v.* Keat, 2 Mod. 249.

[3] Statute 27 Hen. VIII. c. 10, § 3; 1 Cruise, Dig. 358.

[4] Sand. Uses, 122; Tud. Lead. Cas. 261.

law and the law of uses left so much room for construction, that it led practically to the ingrafting of the one upon the other in the application of the statute by the courts. Thus many of the rules of the common law were made to give place to sundry modifications of the laws of real property which had been adopted by chancery before the statute, in dealing with uses as distinct from the legal estate. To justify them in so doing, they seized upon that expression which has before been referred to in the statute, uniting the estate of the feoffee to use with the use, in the *cestui que use*, "*after* such *quality*, *manner*, *form*, and *condition* as he had before in or to the use, confidence, or trust that was in him." "The effect is," says Bacon, "that *cestui que use* shall be in possession of like estate as he hath in the use; the fiction, *quo modo*, is, that the statute will have the possession of *cestui que use* as a new body compounded of the matter and the form, and that the feoffee shall give *matter and substance*, and the use shall give form and quality." "But the statute meant such quality, manner, form, and condition as is not repugnant to the corporeal presence and possession of the estate." [1]

23. At common law a freehold could not be limited [*122] to * commence *in futuro*, without some intermediate estate to sustain it as a remainder. But, before the statute, a use might be limited to spring up at a future period, without any such previous estate. So if, at common law, a man seised of a fee parted with it by feofment, he could exercise no further control over it, unless it might be to regain it to himself upon the breach of some condition. But, before the statute, chancery allowed one to create a use in favor of some one in fee, and, at the same time, reserve the power of divesting the first grantee of the use, and of passing it over to another in fee. Accordingly, Lord Hardwicke, referring to springing uses and powers such as are above described, as well as to contingent uses and executory devises which will be more fully explained hereafter, declares that these were all foreign to the notions of the common law, and could not be limited upon common-law fees, but were let in by con-

[1] Cruise, Dig. 363; Castle *v.* Dod, Cro. Jac. 201; 27 Hen. VIII. c. 10, § 1; Bac. Law Tracts, 337, 340.

struction, by the judges themselves, upon uses, after these had become legal estates.[1]

24. Agreeably to this statement, the judges sustained limitations, by way of use, of freeholds to commence *in futuro* without any particular estate to sustain them, and allowed a use to shift from one person to another, by some matter, *ex post facto*, although limited at first in fee, because the same thing had been done with uses by chancery before the statute.[2] And in pursuance of this doctrine it was held, that a covenant to stand seised (and the word *grant* is in some cases sufficient for this) to a future use would be good, without any provision as to the estate in the mean time, since the use would, in such case, be held to *result* to the covenantor, and, in a way hereafter to be explained, his seisin serves the uses, that is, is united with the uses as they arise, whereby they become executed estates.[3] So if A enfeoff B to the use of C, after the death of A, it will be a good use in C, though *in futuro*, the use until the death of A resulting to him.[4]

*25. It is laid down in unqualified terms, in sev- [*123] eral American cases, that an estate of freehold cannot be created to commence *in futuro* by a deed of bargain and sale.[5] But in another case, where there was a grant to a religious society not yet *in esse*, it was held that the right to the possession and custody of the land remained in the grantor till the society became *in esse;* and although the language of the court does not designate the conveyance as a bargain and sale, or covenant to stand seised, or a *grant*, they nevertheless, for the purposes of giving full effect to the grant, and of preserving the estate granted for the uses intended, consider the fee as remaining with the grantor. This, of course, was treating the grant to the society as an estate in fee which was

[1] Hopkins *v.* Hopkins, 1 Atk. 591.

[2] 1 Cruise, Dig. 363; Tud. Lead. Cas. 262.

[3] Roe *v.* Tranmarr, Willes, 682, s. c. 2 Wils. 77; Tud. Lead. Cas. 262; Osman *v.* Sheafe, 3 Lev. 370; 2 Smith, Lead. Cas. 288–297; Hayes *v.* Kershow, 1 Sandf. Ch. 258, 267; Sleigh Metham, 1 Lutw. 782; Doe *v.* Salkeld, Willes, 674.

[4] Tud. Cas. 262; Gilbert, Uses, Sugd. ed. 163.

[5] Pray *v.* Pierce, 7 Mass. 381; Parker *v.* Nichols, 7 Pick. 115; Gale *v.* Coburn, 18 Pick. 397; Brewer *v.* Hardy, 22 Pick. 376; Marden *v.* Chase, 32 Me. 329.

to take effect *in futuro*.[1] In Jackson *v.* Dunsbagh,[2] moreover, the court of New York held that a bargain and sale of a freehold *in futuro* would be good, because the use in the mean time resulted to the bargainor. "Here," say the court, "is a conveyance to the bargainee to take effect at the decease of the bargainor." The court cite Bacon's Law Tracts, 352, in which it is said: "If I bargain and sell my land after seven years, the inheritance of the use only passeth, and there remains an estate for years by a kind of subtraction of the inheritance or occupier of my estate, but merely at the common law."

[*124] In the case cited from New York, the conveyance was between * father and son, but there was a consideration of ten shillings acknowledged in the deed. But in a case in Massachusetts, Judge Jackson uses this language: "The principle, then, seems to be, that a man may convey his land by a covenant to stand seised thereof to the use of another, either for certain good considerations or for a valuable consideration; but in the latter case the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; *from which it follows, that a freehold to commence* in futuro *cannot be conveyed in this mode*, as that would be to make a bargainee hold to the use of another until the freehold should vest.[3] The question would seem to be, therefore, whether, in the cases where it has been held that there may be an estate of freehold *in futuro*, created by bargain and sale, it is not, in effect, holding that estates may be created by covenant to stand seised, although the consideration is a pecuniary one?[4] In

[1] Shapleigh *v.* Pilsbury, 1 Me. 271. The technical grounds on which the case was decided are not very satisfactorily stated. It is obviously a case of a springing use. See *post*, p. *616.

[2] Jackson *v.* Dunsbagh, 1 Johns. Cas. 96; Gilbert, Uses, Sugd. ed. 163; Jackson *v.* McKenny, 3 Wend. 235.

[3] Welsh *v.* Foster, 12 Mass. 93, 96.

[4] Jackson *v.* McKenny, 3 Wend. 235; Jackson *v.* Swart, 20 Johns. 85; Hayes *v.* Kershow, 1 Sandf. Ch. 267, 268; Jackson *v.* Staats, 11 Johns. 337; Bell *v.* Scammon, 15 N. H. 394; Bank *v.* Housman, 6 Paige, 526; *post*, p. *616, *618.

addition to the foregoing decided cases, the language of eminent writers upon the subject may be cited. Mr. Sugden, speaking of springing uses, says: "If raised by a covenant to stand seised, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arises. Therefore a bargain and sale to the use of J. D., after the death of J. S. without issue, cannot be limited on a bargain and sale to a person not *in esse*.[1] Mr. Cornish says: "By bargain and sale or covenant to stand seised, a freehold may be created *in futuro*."[2] Mr. Sanders says: "Rolle, indeed, puts the case of covenant to stand seised for money; but such covenant would, at this day, operate as a bargain and sale."[3]

26. For reasons above stated, a feoffor was allowed to reserve to himself or some other person a *power* of revoking a limitation of uses which he should make, and to appoint a new use instead thereof, to some other person, since, as the law stood before the statute, the feoffee had no interest in the land other than to execute the directions of the feoffor as to who should have the use of the estate, and the feoffor might change these uses at his will, even though the first use declared was in fee. This could not have been done at common law, since, after a man had parted with his seisin and fee, he could have no further control over the estate.[4]

27. As every use depended for its being executed upon a *seisin* in some one, upon which the law should operate by uniting the same with the use, questions of a nice and subtle character early arose, which have not yet been satisfactorily settled, as to what and where the seisin is, which
*is to serve the second use, where the first is revoked [*125]
or is defeated, and it is attempted to give force and
effect to the second use. Thus, for example, A grants to B and his heirs an estate to the use of C and his heirs, followed by a provision whereby the use in C may cease, and another be raised in favor of D in a certain event; or the grantor reserves to himself, or to another, the power of revoking the use in C, and he does so, and appoints the use to D. In

[1] Gilbert, Uses, by Sugd. 163; Tud. Lead. Cas. 262.
[2] Cornish, Uses, 44, 89; 2 Smith, Lead. Cas. 5th ed. 451.
[3] 2 Sand. Uses, 59.
[4] 1 Cruise, Dig. 364; Co. Lit. 237 a.

either of these cases the grantor parted with his seisin to the feoffee B; and the seisin of B was at once, by the statute, taken from him, and executed in C, by being united with the use, originally declared in his favor. Now, the question is, When the use and seisin in C is revoked, or becomes null, and a new use is raised in D, where and in whom is the seisin which is to serve the new use, and, by being executed in D, will give him the new legal estate? Some have insisted, that although the original seisin in B was thus divested and passed to C, yet that there was enough of seisin or possibility of entry left in B to serve the new use in D, and, for want of any better name, have called this a *scintilla juris*, a spark of legal light which may be made to warm into vital action the new use when it is declared. There are other and more rational and consistent theories upon the subject, which are noticed in the authorities cited below, and will be considered more at length hereafter, as the principal purpose in referring to the subject here was to indicate, in passing, the basis on which modern uses have been built up, and the matter is of little or no practical importance.[1]

28. Different terms are applied to describe future uses, depending upon the manner in which they are to arise. If a use is to arise by the happening of some contingent event which is provided for by the deed declaring it, which event may be called the act of God, it takes the name of a [*126] future, a contingent, or *an executory use. But when it arises from the act of some agent or person named in the deed creating it, it is called a use arising from the execution of a power. Both are in effect, however, future or contingent uses till the act is done.[2]

29. In all future or executory uses, there is, the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c., to knit itself to and support

[1] Chudleigh's case, 1 Rep. 129; Tud. Lead. Cas. 260; Hayes, Real Est. 166; Gilbert, Uses, Sugd. ed. 296, note; Sand. Uses, 110; 1 Sugd. Pow. 41. Instead of the seisin going back to the feoffees to serve the second use, the true doctrine seems to be, that it acquired by statute, when it left the feoffee, a capacity of transmission to the use, wherever it may be.

[2] Shep. Touch. Prest. ed. 529, n.; Weale *v.* Lower, Pollexf. 65; Gilbert, Uses, Sugd. ed. 159.

those uses; so that it may be truly said the feoffees or grantees stand seised to those uses, and then by the force of the statute the *cestui que use* is put into the actual possession. It is wholly immaterial how or by what means the future use comes *in esse*.[1] The estate thus acquired by the *cestui que use* has the qualities and is subject to all the legal incidents of a legal estate, such as escheat, dower, curtesy, and the like; while that of the feoffee to use, being instantly taken out of him as soon as created, is not subject to any of these legal incidents.[2]

30. But if a future contingent use is limited as a remainder, the same rule applies as to its being necessary that it should vest during the particular estate, or immediately on its determination, as was applied at common law to remainders in the conveyance of lands, and as will be explained in a future chapter.[3]

31. Enough has been stated to show, that, though one of the professed objects of the statute was to restore simplicity and notoriety in the transfer of estates, it might, under the construction given by the courts, be made the means of complicating conveyances of lands, as well as of their being secretly made. It retained uses, thereby doing away with the formal livery of seisin as a means of notoriety; and so obviously did it fail to restore the former notoriety of the common law, by allowing the contract of sale to be complete and effectual by a mere oral agreement, that an attempt was made, the very same *year with the passage of the act, to correct [*127] this evil by a second act, 27 Hen. VIII. c. 16, which required a conveyance of land by a bargain and sale to be in writing, indented and sealed, if it was of a freehold estate, and to be enrolled in one of the king's courts of record at Westminster. But this did not extend to a bargain and sale of lands for a term of years.[4]

32. But as, prior to the statute of frauds in the time of

[1] Shep. Touch. Prest. ed. 529, n.

[2] Tud. Lead. Cas. 261; Sand. Uses, 119.

[3] Chudleigh's case, 1 Rep. 130, 135; Tud. Lead. Cas. 261; Gilbert, Uses, Sugd. ed. 165; Adams *v.* Savage, 2 Salk. 680; Fearne, Cont. Rem. 284.

[4] Wms. Real Prop. 150; Bac. Law Tracts, 344; 1 Cruise, Dig. 365; Gilbert, Uses, Sugd. ed. 502

Charles the Second, it did not require a written instrument to convey corporeal hereditaments, except as provided in the matter of deeds of bargain and sale, the ingenuity of conveyancers was not slow in devising various modes of conveying lands, which, while conforming to the letter of the statute of frauds, made the transfer of these a secret act between the parties. By some of these modes the grantor parted with the possession of his land by force and effect of the common law in the act of conveying it; in others he did not. The former were said to be conveyances by the *transmutation* of possession; the latter, conveyances without such transmutation. In the former, the grantor transferred the seisin, by feofment at common law, to an intermediate feoffee, while he named the *cestui que use* to whom the use was given, and the statute passed the seisin of the grantor through such feoffee to the *cestui que use*, thus completing a title in him by the union of the seisin and the use; in the latter, the grantor gave or raised the use in favor of the *cestui que use*, and without parting with the seisin to any intermediate person, the seisin that was in himself serving the use, and being taken from him by the statute and united with the use in the *cestui que use*. The ultimate effect was the same in the one mode as in the other.[1] But in the former, if the grantor wished to create an estate in fee in the *cestui que use*, he must give a fee to the feoffee to use. A limitation to A to the use of B and his heirs would create only a life-estate in B, as though the use was one for life, unless the feoffee and *cestui que use* are the same person.[2]

[*128] *33. Of the modes of conveyance by the transmutation of the possession above referred to, one was by feofment to use, as where A enfeoffed B to the use of C. The statute directly and at once took the seisin from B, and united it with the use in C, thereby completing the title in him.[3] Another mode, spoken of in the statute, was by fine and recovery, described in a former part of this work;[4] and

[1] Browne, Stat. Frauds, 4; Wms. Real Prop. 151.

[2] 3 Prest. Abst. 123.

[3] Watk. Conv. White's ed. 1838, 240; Tud. Lead. Cas. 265; Wms. Real Prop. 150; Id. 165; 4 Kent, Com. 294; Thatcher *v.* Omans, 3 Pick. 521.

[4] *Ante*, vol. 1, p. *70.

where either of these was accompanied with a declaration of uses in a proper form, it constituted a conveyance to uses.[1] But as these have been abolished by statute in England, and such declarations, it is believed, were never in use as modes of conveyance in this country to any considerable extent, in the sense of deeds to lead or declare the uses of fines and the like, they are purposely omitted here.[2]

34. The modes of conveying estates without the transmutation of possession were more numerous than those of the class above mentioned. One of these, bargain and sale, has already been mentioned, as well as the fact that the statute required the deed thereof to be enrolled, if the estate conveyed was a freehold. This mode of conveyance consisted of a contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell the land to the bargainee; whereupon a use arose in favor of the latter, and the statute at once took from the bargainor the seisin which was in him, and transferred it to the bargainee, who already had the use, and thereby made his title complete.[3] And although by the statute of enrolments such indenture must be enrolled in order to have the full effect of a conveyance, such a bargain and sale made in requisite form, without the enrolment, would be treated by chancery as evidence of an agreement to convey, which might be enforced against the bargainor.

35. Another of these modes was by what was called a * covenant to stand seised, where the person *seised* [*129] of land, being induced to part with the estate to his wife or some person to whom he was akin by blood, in consid-

[1] 2 Prest. Conv. 480; 1 Cruise, Dig. 367; Sand. Uses, 219.

[2] Fines might be levied in New York, by way of quieting titles, until 1830, when the same were abolished by statute. A case of this kind is found in 17 New York, 162, McGregor *v.* Comstock, where the form of proceeding is described. But this does not seem to answer to the conveyance of lands by means of a fine, which is above referred to.

[3] Tud. Lead. Cas. 265; Mestaer *v.* Gillespie, 11 Vas. 625, by Eldon, Ch. It was held in Maryland, that although an existing incorporeal hereditament, like a right of way, could be conveyed by deed of bargain and sale, it could not be created by a deed in that form. It must be done by grant or lease. Hays *v.* Richardson, 1 Gill & J. 378; Beaudely *v.* Brook, Cro. Jac. 189; Shep Touch. Preston's ed. 222, note; and the reason given is, that there can be no use of a thing not *in esse*, as a way, common, and the like, newly created.

eration of such relationship, covenanted to stand seised of the same to the use of such person, either in present or in future. By such covenant he raised the use at the time when, by its terms, the covenant was to take effect; and as soon as the use was raised, it became executed by the statute out of the seisin of the covenantor, by taking that and executing it with the use in the *cestui que use*.[1] The covenant must of course be by deed in order to constitute it a covenant; and the usual term employed in creating it is "covenant," though any other words may be adopted which are tantamount, as bargain and sale, if applied where the consideration of the deed is blood or marriage.[2] And although it may be usual to make the covenant with the one who is to have the benefit of the use, this does not seem to be necessary; as in Bedell's case, for instance, the owner of the land, together with his wife, covenanted with his second and third sons that he the grantor and his heirs would stand seised of the tenements to the use of himself for life, and after his decease to the use of his wife, and after her death to the use of the two sons in moieties, in tail. And it was held, that the use thereby raised to the wife was a good one.[3] A husband cannot, however, covenant with his wife.[4]

36. The rule in England seems to have been very stringent in requiring a bargain and sale to be for a valuable consideration, and a conveyance by covenant to stand seised to be for the consideration of marriage or consanguinity. Nor will they allow a conveyance to have the effect of a bargain and sale where the consideration is not a valuable one, nor of a covenant to stand seised where the consideration is not that of marriage or consanguinity. And if these respec-
[*130] tive considerations were * wanting, the bargain and sale, or covenant, as the case might be, would be in-

[1] Watk. Conv. White's ed. 1838, 333, 337; Tud. Lead. Cas. 265.

[2] Watk. Conv. White's ed. 1838, 335, 336; Sand. Uses, 79; Emery *v.* Chase, 5 Me. 232.

[3] Brewer *v.* Hardy, 22 Pick. 376; Barrett *v.* French, 1 Conn. 354; Bedell's case, 7 Rep. 40; Co. Lit. 112 a; Hayes *v.* Kershow, 1 Sandf. Ch. 258; Cornish, Uses, 43, 44; Leavett *v.* Leavett, 47 N. H. 329.

[4] 3 Wood, Conv. 286; 2 Rolle, Abr. 788; Co. Lit. 112 a.

operative.[1] Though the Touchstone, treating of what would form a good consideration which would be sufficient to sustain a covenant to stand seised, says that "covenant to stand seised to the use of himself, his wife or intended wife, children, brothers, sisters, or cousins, or their wives or intended wives, these are good considerations, and the uses and estates thereupon thus raised and made are good."[2] But a more liberal rule seems to prevail in the United States as to giving effect to a covenant to stand seised where the consideration stated in the deed is a pecuniary one. And courts have often construed deeds as covenants to stand seised, which were insufficient in form to operate otherwise as a conveyance of land, where the intention of the parties could be ascertained from the deed. But this will be further considered hereafter.[3]

37. It may be stated, in order to prevent any misapprehension as to the effect of a bargain or covenant in respect to land, that, if the covenant be an executory one to convey or settle lands to certain uses, it would not operate as a conveyance. To have that effect, it must be an actual present bargain and sale, or covenant to stand seised.[4]

38. Another mode of conveyance, without actual transmutation of possession of the land, derived its force and validity partly from the statute of uses, and partly from the common law, and was known as Lease and Release. It was in use for more than two centuries, and, until the recent act 8 and 9 Vict. 106, was the most usual form of conveying lands in England, and was at last superseded by that act making a simple deed of *grant* sufficient to convey corporeal as well as

[1] 4 Kent. Com. 493; Den *v.* Hanks, 5 Ired. 30; Sand. Uses, 81; Jackson *v.* Sebring, 16 Johns. 515; 1 Cruise, Dig. 107; Smith *v.* Risley, Cro. Car. 529; 3 Wood, Conv. 285.

[2] Shep. Touch. (Hilliard's ed.) 512.

[3] 1 Greenl. Cruise, Dig. 107, note; Welsh *v.* Foster, 12 Mass. 93, 96. And one reason why the American courts are less stringent in discriminating between these modes of conveyance doubtless is, that there is no distinction here as there is in England as to recording the deeds, no enrolment being required there of a covenant to stand seised. See Rawle's note to Wms. Real Prop. 153; 4 Kent, Com. 494; Bowman *v.* Lobe, 14 Rich. Eq. 217.

[4] Tud. Lead. Cas. 260; 1 Sand. Uses, 114; Edwards *v.* Freeman, 2 P. Wms. 435; Trevor *v.* Trevor, 1 P. Wms. 622; Blitheman *v.* Blitheman, Cro. Eliz. 280.

incorporeal hereditaments.[1] There seems to have always prevailed in England a disposition to avoid giving notoriety to the conveyance of lands, from the general custom, perhaps, that prevails there of making them the subjects of family settlement and arrangement. It is to this that the opposition to a general registry act is probably to be
[*131] * ascribed. It was to this disposition that the form of conveyance by lease and release owed its origin. Secret conveyances could not be effected by bargain and sale, for these, if the estate conveyed was a freehold, were required to be enrolled. Nor could it be by covenant to stand seised where the consideration was a valuable one. Lord Norris, accordingly, being desirous of conveying some of his lands in a secret manner, employed Sir Francis Moore, a serjeant at law, at one time a reader at the Temple, and known as the author of "Moore's Reports," and who lived between 1558 and 1621, to devise some plan to effect this purpose. He adopted a hint from the exception made in the statute in respect to enrolling bargains and sales, where the estate was less than a freehold. Acting upon this, he conveyed the estate by bargain and sale in the usual form to the bargainee for one year, which took effect by force of the statute of uses, without the necessity of any enrolment, so as to make the lease good without any entry made or formal possession delivered. The bargainor, lessor, or grantor (for he acted all these parts), was then to execute and deliver an ordinary deed of release at common law, to the bargainee or lessee, in fee; and this did not require any livery of seisin to give it effect, since the grantee or relessee was theoretically already in actual possession of the premises. The bargain and sale for the year was usually by deed, though by the statute of frauds it was only required to be in *writing*. And this deed was usually dated the day before the deed of release, and acknowledged the receipt of some nominal sum of money, but was executed the same day with the release. This form was continued up to 1841, when, by statute, it might be effectual if made by a single deed.[2]

[1] Wms. Real Prop. 153; Gilbert, Uses, Sugd. ed. 224.

[2] Wms. Real Prop. 151, 153; 2 Prest. Conv. 219; Tud. Lead. Cas. 265; Wallace, Reporters, 86.

39. This mode of conveyance has been in use at times in some of the States in this country, but is now rarely if ever employed.[1]

40. In respect to the formality with which uses should be declared in order to take effect, it may be remarked, that, before * the statute of frauds, it might have been [*132] done by parol. But, by that statute, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, except such as arise or result by implication of law, are required to be manifested and proved by some writing signed by the party, or by his last will and testament. And where the conveyance is by transmutation of possession, it is not necessary that this declaration should be by the same instrument by which the conveyance is made. It will be sufficient if done by that or a distinct instrument. But instruments which do not operate by transmutation of possession, such as bargain and sale, covenant to stand seised, and the execution of an appointment under a power, are in themselves the declaration of the uses to which the seisin is executed by the statute.[2] There are no formal words required to be employed in declaring a use. It is only necessary that the declaration should be certain, and especially as to the persons in whose favor it is intended to be made, the estates they are to take, and the lands in regard to which the declaration is made.[3]

41. The doctrine of uses resulting to the grantor of an estate by implication, before the statute, as heretofore mentioned, is in force in certain cases, by the construction which has been given to the statute. But it only applies where there is no consideration to raise the use in favor of any other person. Consequently a use can result only upon a grant of a fee-simple estate ; for the duties which attach to the estate of a tenant in tail, for life, or for years, constitute, in the eye of the law, a consideration for the conveyance so far as to

[1] Wms. Real Prop. 153, Rawle's note; Lewis *v.* Beall, 4 Harr. & M'H. 488. *Vide post,* *606, note.

[2] Stat. 29 Car. II. c. 3, §§ 7, 8; Sand. Uses, 229; Shep. Touch. 519 ; Tud. Lead. Cas. 266.

[3] Tud. Lead. Cas. 267 ; Shep. Touch. 520 ; Sand. Uses, 229.

negative the idea of a use resulting to him who made it, for the want of a consideration, even though none was actually paid.[1]

[*133] 42. Among the cases where the law would raise a resulting *use is that of one conveying his land in fee in a common-law form without declaring the use, and where no consideration is acknowledged. The use in such case would be executed in the grantor himself.[2] So if, in the case above supposed, the use as to a part only of the estate is declared, it would result as to the residue to the grantor; as where a conveyance is made by a man to the use of his heirs, and no use is declared of the same during his life, an estate for life arises in his own favor by implication. So if, besides the use to his heirs, he had declared an immediate use to one for years, so much of the use as would be left between the expiration of the term for years and the grantor's death, when the use to his heirs would be executed, would result to him; and thus would be created, in effect, a present use for years, a use in remainder for life to the grantor, and a use to his heirs in remainder after his decease. So if the limitation be by A, for a valuable consideration, to B in fee, to the use of B for life, without any other declaration, the use in fee after B's death would result to the grantor.[3] In the language of the court of New York, "As a general rule it is true, that where the owner, for a pecuniary consideration, conveys lands to uses, expressly declaring a part of the use, but making no disposition of the residue, so much of the use as the owner does not dispose of remains in him. For example, if an estate be conveyed for a valuable consideration to feoffees and their heirs, to the use of them for their lives,

[1] Castle *v.* Dod, Cro. Jac. 200; Perkins, §§ 533–535; 1 Spence, Eq. Jur. 452; 2 Rolle, Abr. 781, F.; 1 Cruise, Dig. 376; Tud. Lead. Cas. 258; 1 Prest. Est 192.

[2] Armstrong *v.* Wolsey, 2 Wils. 19; Beckwith's case, 2 Rep. 58; Sand. Uses, 100. A deed of bargain and sale in which the consideration is left blank would be inoperative. Moore *v.* Bickham, 4 Binn. 1.

[3] 1 Prest. Est. 191; Wilkins *v.* Perrat, F. Moore, 876; Woodliff *v.* Drury, Cro. Eliz. 439; Pibus *v.* Mitford, 1 Ventr. 372; Tipping *v.* Cozzens, 1 Ld. Raym. 33; Tud. Lead. Cas. 258; 1 Cruise, Dig. 370; Sand. Uses, 103, 104; Fearne, Cont. Rem. 48; Co. Lit. 23 a; Kenniston *v.* Leighton, 43 N. H. 311; Farrington *v.* Barr, 36 N. H. 88, 89.

the remainder of the use will result to the grantor."[1] So if a feofment were made to the use of A B for life, with a remainder to the use of the right heirs of C D, the reversion of the use remains in the feoffor until the heirs of C D shall have been ascertained.[2] And if a feofment be to the use of such person as the feoffor shall appoint by his will, or to the use of himself and wife after their marriage, the use results to the feoffor until the appointment is made in the one case, or the marriage is had in the other.[3] So where a husband and wife conveyed the estate of the wife by fine without any declaration of uses, or a man conveyed to trustees to uses which, by their terms, were not to be executed till after his death, it was held, in the one case, that the use resulted to the wife, and in *the other to the grantor during his [*134] life.[4] But if there be a limitation of uses to one and his heirs during the life of the grantor, and then a limitation to the use of the heirs of the grantor's body, there would be no resulting use to him, and his issue would take as purchasers.[5]

43. But a consideration, though merely a nominal one, as five shillings, for instance, if actually paid, or even, as was held in one case of lease and release, a rent reserved of a peppercorn, would be sufficient to make a good conveyance, and to prevent the use from resulting.[6] And the same effect it would seem would follow from an express acknowledgment of the receipt of a consideration in a deed; for "an averment shall not be allowed or taken against a deed that there was no consideration given, when there is an express consideration upon the deed."[7] *

* Note. — Though a conveyance would be good at law if made for a valuable consideration to the extent of a farthing only. And, after the statute, chan-

[1] Van der Volgen *v.* Yates, 5 Seld. 223. [2] Bac. Law Tracts, 350.

[3] Sir Edward Clere's case, 6 Rep. 17; Bac. Law Tracts, 350.

[4] Beckwith's case, 2 Rep. 56; 1 Cruise, Dig. 372.

[5] 1 Prest. Est. 194; Co. Lit. 22 b, note 135; Sand. Uses, 132; Fearne, Cont. Rem. 51; Tippin *v.* Cosin, Carth. 272, s. c. 4 Mod. 380; Shelley's case, 1 Rep. 95; Sand. Uses, 132. See *post*, p. *135, for the distinction between a limitation over to the heirs of the body of the grantor and his heirs generally.

[6] Tud. Lead. Cas. 258; Sand. Uses, 104; Barker *v.* Keat, 2 Mod. 249; Gilbert, Uses, Sugd. ed. 230, n.; Moore *v.* Bickham, 4 Binn. 1.

[7] 3 Wood, Conv. 285; Fisher *v.* Smith, F. Moore, 569; Wilt *v.* Franklin,

44. And although there be no consideration expressed, if the use is expressly declared, and it covers the entire estate, there will be no resulting use.[1]

45. When the estate in the *cestui que use* is created [*135] by a * mode of conveyance which operates without transmutation of possession, as by a covenant to stand seised, for instance, and a use results to the covenantor until the use in the covenantee, &c., takes effect, it is called a use by implication in such bargainor or covenantor. As where A covenanted to stand seised to the use of his heirs male begotten or to be begotten on the body of his wife, it was held, that he had a use for life by implication, for the obvious reason that no one could take it while he lived.[2] And, upon the same principle, if one bargain and sell, or covenant to stand seised of, an estate, where no use is declared or none arises for want of a consideration, the use would remain in the bargainor or covenantor; or, in other words, the deed would be inoperative, as there would be no use in another for which the law would take away the seisin and possession which are in the bargainor or covenantor to unite them with a new use.[3]

46. Uses can only result to the original owner of the estate out of which they are raised. And when they do result or arise by implication, they are of the same character with the estate which the owner had in the land. Thus if two joint-tenants so create an estate that the use results to them, it is to them as joint-tenants; or if one of two grantors have a

cery could not have impeached its effect as a conveyance in transferring the legal estate; yet, if it were not made for a substantial consideration, chancery would hold the bargainee to be a trustee of the bargainor, and compel him to convey the estate to the bargainor; thus giving the practical effect of a resulting use by means of a decree in equity. Gilbert, Uses, Sugd. ed. Introd. lxi.; 1 Spence, Eq. Jur. 467.

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1 Binn. 518, per Tilghman, C. J.; Id. 519, per Yeates, J. It is necessary to state a valuable consideration to raise a use by bargain and sale; but it is not necessary to state the amount. Okison *v.* Patterson, 1 Watts & S. 395.

[1] Sprague *v.* Woods, 4 Watts & S. 192; Tippin *v.* Cosin, 4 Mod. 380; 1 Prest. Est. 193; Graves *v.* Graves, 9 Foster, 129.

[2] Pibus *v.* Mitford, 1 Ventr. 372; Fearne, Cont. Rem. 41; Co. Lit. 23 a; Cruise, Dig. 374.

[3] 1 Cruise, Dig. 374; Sand. Uses, 100.

reversion, and another the life-estate on which the reversion depends, and a use results, it is to them in the same character and quality. Or if A and B join in conveying B's land, and a use results, it is to B alone.[1]

47. If a use is limited in terms after another use to the same effect as it would have resulted in favor of the grantor, the grantor is in of his old use, and such limitation is void. Thus if the limitation were to the use of one and his heirs, during the life of the grantor, to the use of the grantor's heirs generally, after his death his heirs would not take by purchase as remainder-man, but by descent as reversioners. And the * distinction between this and a former prop- [*136] osition, where the limitation over was to the use of the heirs of the grantor's body, will be obvious upon reflection, since, in the latter case, the heirs take a different estate from that of their ancestors, and take a contingent remainder.[2] And the same principle is applied to cases of devises to heirs at law. Independent of statutes upon this subject, devises to heirs of the same estates as they would have taken by descent were void, and the heirs took as heirs, and not as devisees or purchasers. But this is now altered in England by statute.[3] So, upon the same principle, if one were to limit a use to his son and the heirs of his body, the son would take an estate tail as a purchaser; but if there had been a limitation over of a use to his own heirs by way of remainder, his heirs would take this as a resulting use, and not as a remainder.[4]

48. The reader will already have perceived that the doctrine of a resulting use rests upon the presumption of equity that the owner of land does not intend to part with the same without a consideration, in the absence of any evidence of such intention contained in the deed or instrument of conveyance.

[1] 1 Prest. Est. 195; Beckwith's case, 2 Rep. 58; 1 Cruise, Dig. 373.

[2] Shelley's case, 1 Rep. 95; Co. Lit. 22 b; Else *v.* Osborn, 1 P. Wms. 386; Fenwick *v.* Mitforth, F. Moore, 285; Sand. Uses, 133; Watk. Conv. White's ed. 1838, 172, n.; Co. Lit. 22 b, n. 134; Id. n. 135; Tippin *v.* Cosin, Carth. 273; Le Countee de Bedford's case, F. Moore, 720.

[3] Wms. Real Prop. 181; 1 Jarm. Wills, 67; Stat. 3 & 4 Wm. IV. c. 106, § 3.

[4] Le Countee de Bedford's case, F. Moore, 720; Co. Lit. 22 b; Read *v.* Erington, Cro. Eliz. 321.

It may now be added, that, like legal presumptions, this may be controlled by evidence that it was the intention of the grantor that the use should go with the legal estate. This evidence may be derived from circumstances or from positive evidence, and parol evidence is competent to establish such an intention. Thus, where A enfeoffed B upon condition that B should reconvey to A for life, with remainder to the oldest son of A, it was held that no use resulted to A, but that the whole estate vested in B, as he could not otherwise convey an estate to A and to his son.[1] And in connection with
[*137] the competency of *parol evidence to control a resulting use, it may be added, that the seventh section of the statute of frauds, requiring declarations or creations of trust or confidence, &c., to be in writing, applies to uses and trusts declared or raised in favor of persons other than the one declaring or creating them;[2] and the statute expressly excepts from its operation trusts or confidences which arise or result by the implication or construction of law. And accordingly, where the plaintiff set up a resulting trust, verbal evidence of his admission that the whole land was the defendant's, and that he had nothing to do with it, was held competent;[3] though, as heretofore stated, where there is a use declared by the instrument conveying the estate, it cannot be negatived or controlled by parol evidence.[4] Nor will the law imply a use in favor of the grantor if the deed limits the estate to the use of the grantee, though it be made without any consideration.[5] Nor will a use result to one man where another has paid the consideration for the conveyance.[6]

[1] Winnington's case, Jenkins, 44.

[2] Capen *v.* Richardson, 7 Gray, 369; Walker *v.* Locke, 5 Cush. 90; Browne, Stat. Frauds, § 83 *et seq.*

[3] Botsford *v.* Burr, 2 Johns. Ch. 405.

[4] Lewis *v.* Lewis, 2 Rep. in Chanc. 77; Lewin, Trusts, 27; 1 Spence, Eq. Jur. 451, 511; St. John *v.* Benedict, 6 Johns. Ch. 116, 117. And for the general principle of proving or controlling the intention of a grantor as to a use resulting, &c., see Walker *v.* Walker, 2 Atk. 98; Lake *v.* Lake, Ambl. 127; Sand. Uses, 104; 1 Cruise, Dig. 375; 1 Spence, Eq. Jur. 511; Browne, Stat. Frauds, § 92; 3 Sugd. Vend. & P. Hamm. ed. 260; Roe *v.* Popham, Dougl. 25; Boyd *v.* M'Lean, 1 Johns. Ch. 582; Peabody *v.* Tarbell, 2 Cush. 232; Altham *v.* Anglesea, per Holt, C. J., 11 Mod. 210; Mass. Gen. Stat. c. 100, § 19; Tud. Lead. Cas. 258; Lamplugh *v.* Lamplugh, 1 P. Wms. 112.

[5] Graves *v.* Graves, 9 Foster, 121. [6] Capen *v.* Richardson, 7 Gray, 370.

49. According to the principles above laid down, where the owner expressly limits a use to himself, it precludes the idea of his intending to reserve to himself a different use; and therefore the law will not raise one by implication which is inconsistent with the one so limited. Thus, where one makes a feofment to his own use for forty years, without limiting any other use, the effect will be to leave the inheritance in the feoffee, as otherwise the use for the forty years being expressly limited to the feoffor, if the remainder is his by implication or as a resulting use, it would be executed in him, and the term as a lesser estate would be merged in the fee, and thereby defeat the feofment in the * feoffee [*138] altogether.[1] So where the use limited by the feoffor in his own favor was for a term of years, with a remainder to take effect after his death, there would not be any use resulting or raised by implication in his favor for life, by reason of the express limitation for years.[2]

SECTION III.

OF USES RAISED BY DEVISES.

1. The doctrine of uses as applied to devises.
2. As to presumption of a resulting use in case of a devise.
3. Of the effect of the failure of a use in a devise.

1. Thus far uses have been treated of as they relate to conveyances of land *inter vivos*. But though the statute of wills was not passed until the 32 Hen. VIII., estates created by will are governed by the rules derived from the statute of uses, the legal estate being transferred to the use in the same mode as by the operation of that statute. Thus, if there were a devise simply to A to the use of B, or in trust for B,

[1] 1 Cruise, Dig. 376; Le Countee de Bedford's case, F. Moore, 720; Tud. Lead. Cas. 258; 1 Prest. Est. 195.

[2] Adams *v.* Savage, 2 Salk. 679; Rawley *v.* Holland, 2 Eq. Cas. Abr. 753; 1 Prest. Est. 195; Sand. Uses, 142.

the statute would execute it at once in B.[1] So a devise by a testator of his lands to his executor in trust for his brother and wife, that he should permit them to occupy the same during their lives, is an executed use for life in husband and wife.[2] But if it had been to A and to his use, to the use of or in trust for B, it would be a use upon a use, and the legal estate would stop in A, but the equitable estate or trust would be in B.[3] Whether the devise shall take effect as an executed use, or as a trust, depends upon the intention of the devisor, as expressed by the instrument creating the devise.[4] If there is any active duty imposed upon the devisee of the legal estate, in carrying out the purposes of the devise in favor of the *cestui que use*, which requires him to be vested with the legal estate, it becomes a trust in the first taker, and the *cestui que use* is, in modern language, a *cestui que trust*, the legal seisin and estate vesting in the trustee.[5] In the cases supposed, it makes no difference in the effect, whether the word "use" or "trust" be used by the devisor in speaking of the equitable interest intended to be created.[6]

[*139]

2. But the doctrine of uses resulting to the one who creates them, where there is no consideration or express declaration of the use, does not apply to cases of devise; for a devise always implies a consideration, and the use will always be in the devisee, unless the contrary appears in the devise itself, and that what is thereby given is not to be to the use of the devisee.[7]

3. But if a person be merely named as a devisee to uses,

[1] Tud. Lead. Cas. 268; Gilbert, Uses, Sugd. ed. 356; Sand. Uses, 243; Co. Lit. 271 b, n. 231, § 3, pt. 5; 2 Jarm. Wills, 196.

[2] Upham *v.* Varney, 15 N. H. 464.

[3] 2 Jarm. Wills, 197.

[4] Co. Lit. 271 b, n. 231, § 3, pt. 5; Sand. Uses, 242; Broughton *v.* Langley, 1 Lutw. 823; Bagshaw *v.* Spencer, 2 Atk. 576.

[5] Doe *v.* Field, 2 B. & Ad. 564; Sand. Uses, 244; Tenny *v.* Moody, 3 Bing. 3; Doe *v.* Homfray, 6 A. & E. 206; Tud. Lead. Cas. 268; Ellis Hartop's case, 1 Leon. 253; Upham *v.* Varney, 15 N. H. 467; Norton *v.* Leonard, 12 Pick. 152; Ayer *v.* Ayer, 16 Pick. 327; Braman *v.* Stiles, 2 Pick. 460; Wood *v.* Wood, 5 Paige, 596.

[6] Doe *v.* Collier, 11 East, 377.

[7] Gilbert, Uses, 162; Sand. Uses, 242; Vernon's case, 4 Rep. 4 a; 1 Lutw. 823; 1 Cruise, Dig. 378.

and the use fails, there will be a resulting use to the heir of the devisor.[1] But if the limitation to the use be void, whether the devisee shall be seised to the use of the devisor and his heirs is doubtful.[2]

SECTION IV.

OF DESTROYING OR SUSPENDING USES, AND OF THEIR APPLICATION.

1. How uses may be destroyed or suspended.
2. Of revoking uses under powers.
3. Of the source of the seisin in executory uses.
4. Importance of uses in conveyancing.
5. Of springing uses, &c., in marriage settlements.
6. Of the clauses as to consideration and uses in deeds.

1. Uses cannot be extinguished, destroyed, or suspended, if they have once been actually executed by the statute, since, by such execution, the union of the seisin and use has created a legal estate. But contingent uses may be extinguished or suspended. Thus, if A makes a feofment to the use of B and * the wife he shall marry, and the feoffees [*140] make a feofment over before the marriage of B, the contingent use to the wife is gone; the seisin that was to sustain it, and, by being united with it, was to give effect to the use, is no longer in the feoffee. The same would be the effect if the feoffee to use were disseised before the contingent use vested, with this difference, that, if the feoffee were to re-enter and regain the seisin, the old use would revive, so that, instead of being destroyed, it would only have been suspended. So if the feofment be to the use of feoffor for life, remainder to the use of the heirs of J. S., and the feoffor die before J. S.,

[1] Ellis Hartop's case, 1 Leon. 254; Gilbert, Uses, Sugd. ed. 486, note.

[2] Gilbert, Uses, Sugd. ed. 486, and note. In Propr. Brattle Sq. Church v. Grant, 3 Gray, 156, it was held, and many cases were cited to sustain the doctrine, that if there were a devise of a fee with an executory limitation over, upon the happening of some event which was to defeat the first and give effect to the second devise, and the devise over was void, — for remoteness, for instance, — it left the first devise absolute.

the contingent remainder is lost for want of a particular estate to sustain it. So where the estate out of which the uses arise is gone, the uses are gone also; as where a lease was made to A for life, to the use of B for life, and A dies, the estate in B is gone.[1] This more naturally, perhaps, belongs to the subject of contingent remainders, which is yet to be treated of; but it seemed proper to notice it briefly in passing, though it may be stated that no conveyance under the statute of uses in this country, or by deeds authorized by statute here, has the effect to defeat contingent remainders.[2]

2. It has already been stated, and will be more fully considered under the head of *Powers*, that uses are often so created as to be revocable by the grantor, who creates them, or some third person by him named in the instrument creating them. It is only necessary to observe, in this connection, that, if this power is properly executed, the old uses *ipso facto* cease.[3]

3. Although it may be little more than a recapitulation, it may be proper to add, that the seisin which is to serve the uses in giving effect to conveyances under the statute of uses, in case these are by feofment, is in the feoffee to use, and passes from him, and is united with the use in the *cestui que use*. In case of bargain and sale, and covenant to stand seised, the seisin is in the bargainor or covenantor, [*141] and passes from him * directly to the bargainee or covenantee the moment a use has been raised in favor of the latter as *cestui que use*, and becomes united therewith. In case of lease and release, the possession passes by the statute to the lessee; the seisin that serves this temporary use remaining in the lessor or bargainor for the term, and then the seisin and reversion pass by the common law by the release of the lessor to the lessee, who is by the statute in possession, and thus completes his estate.[4]

4. Enough has been shown in what has herein been said to

[1] 3 Wood, Conv. 296; Chudleigh's case, 1 Rep. 126.

[2] Dennett *v.* Dennett, 40 N. H. 498; Gilbert, Uses, Sugd. ed. 232 n, 312; 2 Sand. Uses, 54; Den *v.* Crawford, 3 Halst. 107.

[3] 3 Wood, Conv. 297.

[4] 1 Greenl. Cruise, Dig. 325, note; 2 Sand. Uses, 63.

justify the remark, contained in an early part of the chapter, of the importance of the doctrine of uses as applied to modern conveyances. The language of Mr. Preston upon the subject, already cited in part, is, that "within the whole scope of that learning which is more particularly to be studied by the conveyancer, there is none more important to be known than that which concerns the doctrine of uses; for there are many things which may be done through the medium of a conveyance to uses, or under the statute of uses, without a conveyance, which cannot be accomplished by a conveyance merely and simply at common law; and consequently there are many occasions in which it is absolutely necessary to resort to the learning of uses in framing a conveyance, or for giving it effect." [1]

5. If this were the proper connection, reference might be made to the extent to which the doctrine of *springing* and *shifting uses* is applied in carrying out modern family settlements, and the same might be done in respect to *powers*. But as these subjects seem to come in more properly after the doctrine of remainders has been explained, nothing further will be said of them at this time. The subject of trusts, too, though they were derived originally from uses, is obviously one which requires to be treated by itself; and the few observations which follow are designed as a brief and simple explanation of the manner in which some of the principles above stated are applied in carrying out the intention of a grantor to part with his entire estate * to the grantee, [*142] through the forms of conveyances in general use in this country.

6. Thus, to prevent any inference of a resulting use in the grantor, it is usual to acknowledge a consideration received on the part of the grantor; and though, as already stated, it is competent to show by parol that a larger or smaller sum than that mentioned in the deed has been actually paid, it is not competent for the grantor, in the absence of fraud, to negative the receipt of such consideration as will give full effect to the deed as a conveyance.[2] But if it is necessary in order to give

[1] 1 Prest. Abst. 311. See Cornish, Uses, 22, 23.

[2] 3 Wood, Conv. 285; Gilbert, Uses, 51; 1 Greenl. Ev. § 26, note 2; Sand. Uses, 47; Belden *v.* Seymour, 8 Conn. 313.

effect to a deed, the grantee may show *aliunde*, that the relation of kindred or marriage existed between the grantor and grantee, although not mentioned in the deed, and although the consideration recited was a pecuniary one.[1] So, for the same reason, it is usual to declare a use in the deed in favor of the grantee and his heirs; although, where the grantee named is both feoffee and *cestui que use*, the conveyance takes effect under and by virtue of the common law, and derives no validity as such from the statute of uses.[2]

SECTION V.

USES AS APPLIED IN THE SEVERAL STATES.

1. General application of uses in conveyances.
2. Cases of resort to uses to give effect to deed.
3. Uses in Massachusetts.
4. Uses in Maine.
5. Uses in Connecticut.
6. Uses in North Carolina.
7. Uses in Virginia.
8. Uses in Maryland.
9. Uses in New Hampshire.
10. Uses in South Carolina.
11. Uses in Pennsylvania.
12. Uses in New Jersey.
13. Uses in Vermont.
14. Uses in Ohio, Iowa, and Kansas.
15. Uses in Tennessee.
16, 17. Uses in New York.
18. Forms of deeds in the several States.
19–21. Of covenant to stand seised, and its consideration.

1. It would be difficult to define, with any satisfactory degree of accuracy, the extent to which the doctrine of uses has been applied in the systems of conveyance adopted by the

[1] Gale *v.* Coburn, 18 Pick. 297; Brewer *v.* Hardy, 22 Pick. 370; Bryan *v.* Bradley, 16 Conn. 474. See *contra*, 2 Sand. Uses, 48. And see Sugd. Gilbert, Uses, 253.

[2] 1 Prest. Abst. 101; Wms. Real Prop. 132, 154; Belden *v.* Seymour, 8 Conn. 304.

several States of this country. In few, if any, of these, are there any prescribed forms of deeds which it is necessary to follow in executing *conveyances of lands. [*143] In a large proportion of them, the form is that of bargain and sale, though other forms which clearly indicate the intention of the grantor to pass the estate are held sufficient. In several of these States the forms of English conveyances of feofment, bargain and sale, lease and release, and covenant to stand seised, are recognized by statute as modes in use; while the forms of attesting, acknowledging, and recording the same, are prescribed by the same statute. In some of the States, the statute of uses has been adopted and recognized as a part of the common law. Such is the case in Massachusetts, Connecticut, New Hampshire, Alabama, and Rhode Island.[1] Thus, in the last case cited below, the deed was to S, *habendum* to him and his heirs, to and for the proper use, benefit, and behoof of E and her heirs, and it was held to create an executed estate in E.[2] In others it has never been so recognized. In others still, it has been expressly determined not to form a part of the common law; while the statute of uses in some of the States is supplied by statutory enactments which contain in a declaratory form substantially the modifications which had been introduced into the common-law system of conveyances by means of uses, answering to springing and shifting uses, powers, and the like. Thus, in Michigan and Wisconsin, a deed to A, in trust for B, makes B the legal owner of the estate.[3] And by statute, such a conveyance passes no estate to the trustee, but vests it at once in the *cestui que trust*, unless some active duty is imposed upon the trustee.[4] With such a variety of forms and systems of conveyances, it would be inexpedient to attempt to define, with any considerable degree of precision, how far uses are in force in each of these States. The most that will be attempted

[1] Johnson *v.* Johnson, 7 Allen, 197; Bryan *v.* Bradley, 16 Conn. 483; Bell *v.* Scammon, 15 N. H. 394; Rollins *v.* Riley, 43 N. H. 11; Horton *v.* Sledge, 29 Ala. 496; Nightingale *v.* Hidden, 7 R. I. 132.

[2] 7 R. I. 132.

[3] Ready *v.* Kearsley, 14 Mich. 228; Riehl *v.* Bingenheimer, 28 Wis. 84.

[4] Comp. St. c. 86, § 5; 1871, c. 148, § 5. So also in New York, Lalor, 154, 158.

will be to state generally under what circumstances and in what States they have been recognized, referring to the work of Mr. Thornton on Conveyances for authority, where other references are not specially made.[1]

2. It may be stated generally, that the cases in which resort has been had to the doctrine of uses have been where the parties, in undertaking to convey lands, have failed to follow the form in use in the State, or have undertaken, by a form borrowed from the common law, to create an interest like a freehold *in futuro*, for instance, which could not be done by construing the conveyance as one deriving its validity from the common law, and resort has been had to the doctrine of uses in order to effectuate the intention of the parties.[2]

3. In Massachusetts, the form of deeds in use is said to be a free translation of the old charter of feofment, [*144] omitting * the *reddendum*, and adding a covenant of warranty, while it is held that deeds of release and quitclaim are effectual to pass whatever estate the grantor could convey by bargain and sale. If the deed in use is examined, it will be found to give, grant, bargain, sell, and convey, stating a consideration, and limiting the granted premises to the grantee and his heirs, *to his and their use.* Yet the only effect of this is to exclude the idea of a resulting use; for such a conveyance as has been heretofore shown takes effect at common law, and not by the statute of uses, since the grantee or feoffee and *cestui que use* are one and the same person. But the cases have been numerous where substantially the same forms of deeds have been held to be conveyances under the statute of uses, most generally, if the relationship of the parties is shown, as covenants to stand seised. Thus a deed recorded without being acknowledged, where the consideration was natural affection for a son, and five shillings, was held to be a covenant to stand seised.[3] On the other hand, where the deed was one of bargain and sale to A to the use of B, which, by a strict application of the

[1] For the extent to which uses are applied in the United States, see Hill on Trustees, Whart. ed. p. 230, note.

[2] 2 Smith, Lead. Cas. 5th Am. ed. 453.

[3] Cox *v.* Edwards, 14 Mass. 492.

English law of uses, would be a trust for B, it was held, that the deed might be construed a feofment to A to the use of B, which would be executed in B.[1] In the same case the court held that the statute of uses formed a part of the common law of the State. In another case, a father conveyed to a son, in consideration of $400, to have and to hold, &c., after the death of the grantor, with covenants of seisin and warranty. The court held the conveyance to be a covenant to stand seised to the use of the grantor during his life, and after his death to the use of the grantee, &c.[2] In another case, where the deed was in form a release and quitclaim to one who was not in possession, it was held, that the deed might be construed a bargain and sale or other lawful conveyance by which the estate might pass, "the recording of the deed being by law equivalent to an actual livery and seisin."[3] This latter *circumstance was wanting in [*145] the first case above cited, since the recording of a deed without its being acknowledged has no validity as a record.[4] So where the deed was by a grandfather to his grandson, in consideration of his living with the grantor during life, to come into possession when twenty-one years old, it was held to be a covenant to stand seised, as it could not be a bargain and sale, since it purported to convey a freehold *in futuro*.[5] So where a father conveyed to a daughter, reserving the use of his estate during his life and that of his wife, it was held a covenant to stand seised to the use of the grantor for life, remainder to the use of the wife, though not named as grantee in the deed, remainder to the use of the daughter, in whom the use was finally executed as a remainder, and not as a springing use.[6] In some of the cases cited, the consideration mentioned was a pecuniary one, though in fact a relationship of some sort was proved to exist between the

[1] Marshall *v.* Fish, 6 Mass. 24, 32; Hunt *v.* Hunt, 14 Pick. 374, 380.

[2] Wallis *v.* Wallis, 4 Mass. 135.

[3] Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143, 152.

[4] Blood *v.* Blood, 23 Pick. 80.

[5] Parker *v.* Nichols, 7 Pick. 111; Gale *v.* Coburn, 18 Pick. 397. See Marden *v.* Chase, 32 Me. 329.

[6] Brewer *v.* Hardy, 22 Pick. 376. See Thatcher *v.* Omans, 3 Pick. 522, a deed by husband and wife of wife's land to another, to the use of husband and wife, made an effectual conveyance to them both.

grantor and grantee. And now it is settled in Massachusetts that a covenant to stand seised may be effectual to pass a title, though based upon a valuable consideration alone.[1] And how far in this country the line is preserved between bargain and sale and covenant to stand seised in respect to consideration will be the subject of future consideration.

4. In Maine, there are the same forms and rules substantially as in Massachusetts, as to applying uses, in conveyances by deed. Thus a grant to a corporation not yet *in esse*, for pious uses, was held to give the grantor the right of possession until the grantees came into being, and then the estate and right of possession passed to them.[2] So where a husband and wife made a deed, reserving the improvement of one-half of the premises for the lives of the husband and his wife, as there was no such relationship between the parties as to apply the doctrine of covenant to stand seised, the law of this State requiring the consideration for such a conveyance to be a good one, it was held, that, as to one-half of the estate, [*146] the conveyance * might be construed to be a feofment to the use of the grantor, and then to the use of his wife; and as to the other half, that the use was executed in the grantee.[3] These cases will justify the language of the courts in several cases where they have stated, in effect, that a conveyance of land, by deed, may be considered any species of conveyance necessary to effect the intent of the parties to the deed, and not repugnant to the terms of it.[4]

5. In Connecticut the statute of uses is held to form a part of the common law, and has often been applied in giving effect to what would otherwise have been an informal and inoperative deed. Thus, in one case, the grant was to A in trust for B during her life, and after her death to her children and their heirs; and it was held not to be a trust in which the legal estate was in A, but a use executed in B for life, and her children in remainder in fee.[5] So, in a case similar to that above cited of Brewer *v.* Hardy, the court held

[1] Trafton *v.* Hawes, 102 Mass. 533.

[2] Shapleigh *v.* Pilsbury, 1 Me. 271.

[3] Emery *v.* Chase, 5 Me. 232.

[4] Marshall *v.* Fisk, 6 Mass. 24, 32; Emery *v.* Chase, 5 Me. 232; Foster *v.* Dennison, 9 Ohio, 121.

[5] Bacon *v.* Taylor, Kirby, 368.

the deed to be a covenant to stand seised to the grantor's own use during life, and then to the use of the grantee.[1] In another case, the deed, for a nominal consideration of ten dollars, conveyed the estate to a daughter, reserving the use and improvement to the grantor's wife so long as she remained the grantor's widow, he then being sick and about to die. It was held, that it might either be a feofment to uses, or a covenant to stand seised to the use of the wife, and after to the use of the daughter.[2] It may be remarked, that in that State, as in Massachusetts, the record of a deed is equivalent to an actual livery of seisin.[3] In Georgia it was held, that on a conveyance to A in trust to do certain things, and then to convey the land to B the moment the preliminary acts were performed, the use at once was executed in B, without the necessity of any conveyance from A. "Chancery," say the court, "dispenses with useless things, and leaves the use to be executed by the statute of uses, uniting the legal title and the use together."[4] In Indiana, a deed to B, "to be held in trust for the wife or children of W. H.," was held to execute and vest the legal estate in the person for whose use the trustee takes.[5]

6. In North Carolina, the court recognized the existence and application of the doctrine of uses, in a case where the deed was held inoperative, as being neither a conveyance at common law, nor under the statute of uses. It was to A for life, and at * her death to her two children [*147] and their heirs, with covenants of warranty against all claims but those of the grantor during his natural life. No consideration was expressed or proved. There was no relationship between the parties, nor was there any use declared in the deed. It was held not to be a feofment, as no seisin or possession was delivered, nor a bargain and sale for want of a valuable consideration, nor a covenant to stand seised for the like want of a requisite consideration,[6] and therefore void altogether.

[1] Barrett *v.* French, 1 Conn. 354; Brewer *v.* Hardy, 22 Pick. 376.

[2] Bryan *v.* Bradley, 16 Conn. 474. [3] Barrett *v.* French, 1 Conn. 354.

[4] Adams *v.* Guerard, 29 Geo. 676. [5] Linville *v.* Golding, 11 Ind. 374.

[6] Den *v.* Hanks, 5 Ired. 30; s. p. Jackson *v.* Sebring, 16 Johns. 515; Jackson *v.* Cadwell, 1 Cow. 622.

7. In Virginia, a case occurred of a deed from a brother to a sister, in which the words of conveyance were "give, grant, and deliver," with covenant of warranty. No seisin was indorsed; and it was contended that it was a deed of feofment, which was not good without livery of seisin. But the court held it to be a good covenant to stand seised, "the use being forthwith executed in possession by force of the statute of uses."[1] By statute in that State, the effect of a conveyance by a bargainor to a bargainee is to transfer the possession to the use as perfectly as if the bargainee had been enfeoffed with livery of seisin of the land conveyed.[2]

8. In Maryland, bargain and sale has nearly superseded all other modes of conveyance, and the rules applicable to such deeds seem to be the same in England. The use is executed in the bargainee by the statute, and a limitation to the use of any one but the bargainee converts it into a trust, the bargainee having the legal estate, and the person named as *cestui que use* becoming thereby the *cestui que trust*.[3] It is moreover held, that to constitute a conveyance a bargain and sale, the consideration must be a *pecuniary* one; and where it was recited to be *land*, the conveyance could not operate as a bargain and sale, though a general recital of divers valuable considerations or the like would be sufficient.[4] If the [*148] consideration * be blood, marriage, or natural affection, the deed must operate as a covenant to stand seised, and not as a bargain and sale. But a deed in the form of a bargain and sale, containing the words "give and grant," might operate as a feofment, if accompanied with a livery of seisin, although, for the reasons above stated, it would not pass the estate as a bargain and sale.[5] And now the enrolment of the deed is equivalent to livery of seisin, the ancient form of livery having become obsolete.[6] Deeds of bargain and sale are sufficient to pass any freehold in possession, reversion, or remainder, unless the bargainor be out of actual or

[1] Rowletts *v.* Daniel, 4 Munf. 473.
[2] Tabb *v.* Baird, 3 Call, 475; Duval *v.* Bibb, Id. 362.
[3] Matthews *v.* Ward, 10 Gill & J. 443.
[4] But see 2 Sand. Uses, 47.
[5] Cheney *v.* Watkins, 1 Har. & J. 527.
[6] Matthews *v.* Ward, 10 Gill & J. 443.

constructive possession of the same.[1] A case, moreover, is reported, which was decided in 1750, where it was held, that one who had a seisin in law, but never an actual seisin, might convey by lease and release, there being no one in adverse possession at the time.[2]

9. In New Hampshire, it was declared by statute in what mode lands might be conveyed, and the form prescribed required the attestation of two witnesses to the deed. But it was held, that this did not exclude other modes known to the common law ; and accordingly, where a father conveyed to a son, who at the same time, by deed not witnessed, leased and quitclaimed the estate to the father during his life, the court held, that the only way in which these two instruments could be carried into effect was under the statute of uses; that this statute was brought with the original colonists as a part of their common law, and was in force here, and that the deed without witnesses, as an instrument of conveyance, was a covenant on the part of the son to stand seised to the use of the father, the statute executing the use in the father, who was thereby entitled to possession of the premises. This, and bargain and sale as a mode of conveyance, were recognized by the court as valid forms in that State.[3] * The statute of uses is expressly recognized as in force in this State, and has been variously applied:[4] thus a covenant to stand seised to the use of the covenantor during life, and after his death to the use of A B, was held to create a remainder in A B.[5] So a deed to A to the use of a corporation vests the estate in the corporation.[6] So a devise to A in trust for B, for life, and after his death for others, was held to create an executed estate divested of any trust, there being no duty imposed

* NOTE. — It was held in a recent case, that though a contingent remainder may be barred by a conveyance of the particular estate by feofment, it would not be by a conveyance under the statute of uses, nor under the form recognized by the statute of the State. Dennett *v.* Dennett, 40 N. H. 498.

[1] Mason *v.* Smallwood, 4 Har. & M'H. 484.

[2] Lewis *v.* Beall, 4 Har. & M'H. 488.

[3] French *v.* French, 3 N. H. 234; Chamberlain *v.* Crane, 1 N. H. 64; Pritchard *v.* Brown, 4 N. H. 397.

[4] Hutchins *v.* Heywood, 50 N. H. 491.

[5] Rollins *v.* Riley, 44 N. H. 11. [6] Wilcox *v.* Wheeler, 47 N. H. 490.

upon the trustee.[1] But still, to give validity to a deed, the statute requires it to be attested by two subscribing witnesses.[2] And, until a change in the statute, a deed not so attested would have been of no avail against even the grantor and his heirs, though the law now makes it good against these.[3]

[*149] *10. In South Carolina, an early statute, 1731, provided that no deed of feofment should be impeached for want of enrolment thereof. And a statute of 1791 provides for a form of conveyance, but does not invalidate those already in use.[4] And it has been held that a covenant to stand seised is a valid mode of conveying lands in that State, and that a freehold may thereby be created to take effect *in futuro*.[5]

11. In Pennsylvania, it was reported by the judges of the Supreme Court, that among the English statutes in force there were the first to the seventh with the ninth and tenth sections of the statute of uses;[6] and many cases have arisen in that State in which this statute, as affecting the conveyances of lands, is expressly recognized.[7] In one of these cases, it was held to be sufficient to give effect to the statute, and raise a use, if there was an acknowledgment of a previous consideration, although the jury found that none had been paid.[8] It has also been held, that a use may be raised by a deed of bargain and sale, or any other form of conveyance duly recorded, in any one in whose favor it is expressly declared by the deed, though no consideration be expressed;[9] though in an earlier case it had been decided, that, in order to raise a use by bargain and sale, there must be a valuable consideration acknowledged in the deed, but the amount need

[1] Hayes *v.* Tabor, 41 N. H. 521.

[2] Stone *v.* Ashley, 13 N. H. 38; Underwood *v.* Campbell, 14 N. H. 396; Cram *v.* Ingalls, 18 N. H. 616.

[3] Kingsley *v.* Holbrook, 45 N. H. 320; Comp. Stat. c. 136, § 4; Gen. Stat 1867, c. 15, §§ 3, 4; *post*, *572.

[4] Redfern *v.* Middleton, Rice, 464.

[5] Kinsler *v.* Clark, 1 Rich. 170; Chancellor *v.* Windham, Id. 161.

[6] 3 Binn. 599.

[7] Ashhurst *v.* Given, 5 Watts & S. 323; Wilt *v.* Franklin, 1 Binn. 502; Sprague *v.* Woods, 4 Watts & S. 192; Okison *v.* Patterson, 1 Watts & S. 395.

[8] Wilt *v.* Franklin, 1 Binn. 502. [9] Sprague *v.* Woods, 4 Watts & S. 192

not be stated.[1] It is not proposed here to examine the question raised in some of those cases, whether or not a trust is raised by certain forms of expression in deeds, but merely to show * how far the English statute of uses [*150] has been adopted in this State. It should be added, that, by statute, all deeds made and executed in the form therein prescribed are as valid as deeds of feofment with livery of seisin at the common law.[2]

In the Circuit Court of the United States for the District of Pennsylvania, the subject of uses as applied to conveyances is fully examined by Washington, J., in a case in which it was held that a conveyance by lease and release may be good, the lessor standing seised to the use of the lessee for a year, and the release of the freehold taking effect at common law. So that if, in such a case, the lease and release be to A and his heirs, to the use of A and his heirs, to the use of B and his heirs, it would not be a use upon a use, but the deed would operate like a feofment to A, to the use of B, where the statute executes the use in B. But by a bargain and sale or covenant to stand seised, the first use executes in the bargainee or covenantee; and if a second be limited, it becomes a trust. The words "use" and "trust" in a deed being convertible terms, the sense in which they are used depends upon the subject-matter to which they relate.[3] In the case cited, it is assumed that the freehold estate which vests in the releasee by enlargement is an estate at common law, and does not require the aid of the statute to execute the possession to the use; and that there is, therefore, no second use in such a case, and the statute executes the use to B, the second person named. But in Doe *v.* Passingham,[4] it was held that where the limitation was by deed of grant and release, to A, to the use of A, in trust for B, though it was true * that A was in by the common law, yet he [*151] was in of the estate clothed with the use which remained in him; and that, in such case, the use of the estate was executed in the trustee. And although the trustee takes

[1] Okison *v.* Patterson, 1 Watts & S. 395.

[2] 2 Smith, Lead. Cas. 5th Am. ed. 453.

[3] Hurst *v.* M'Neil, 1 Wash. C. C. 70. [4] Doe *v.* Passingham, 6 B. & C. 305.

the seisin by the common law, and not by the statute, yet he takes that seisin to the use of himself, and not to the use of another, in which case alone the use is executed by the statute. The court of Pennsylvania, in the case of the grant of a fee-farm rent to one in fee, for the use of himself, his heirs and assigns, to receive the same in trust for another person named in the deed, held, that the statute did not execute or operate upon the second or ulterior use.[1] The subject is further considered in the authorities cited below.[2]

12. In New Jersey, a statute of the State accomplishes very much the same thing as the statute of 27 Hen. VIII., declaring that wherever uses are limited, granted, released, sold, given, or conveyed by deed, grant, &c., the grantees are to be in as full possession as if they were possessed by solemn livery of seisin and possession. The purposes of this statute have been declared to be to unite or transfer the possession to the use, and to declare the nature and quality of such possession. But though the one entitled to the use in lands is declared to be in as full possession as if possessed by solemn livery, it has been held, that a deed of bargain and sale will not, any more than in England, operate to convey or affect any estate which is not in the bargainor.[3]

13. In Vermont, the superior court of the State, by Redfield, C. J., held, that the English statute of uses was not in force, though Thompson, J., of the United States Court, had held otherwise in the same district. And one reason suggested by the former why the statute was not needed [*152] was, that the courts of equity *in that State had full power to accomplish the intention of the parties to deeds, without resorting to the doctrine of that statute.[4]

[1] Franciscus *v.* Reigart, 4 Watts, 118.

[2] 1 Sugd. Pow. 3d Am. ed. 169; Whetstone *v.* Bury, 2 P. Wms. 146; Doe *v.* Martin, 4 T. R. 89; 2 Smith, Lead. Cas. 5th Am. ed. 454, where the proposition is stated thus: "Nothing is better settled in conveyancing than that, where a lease and release or feofment is made *to A to the use of B*, the statute is limited in its operations to A, and the use to B takes effect only as trust;" obviously omitting, by mistake, the words "to the use of A," after *A* in the text. But see Co. Lit. 271 b, n. 231, by Butler, III. 3; *post*, p. *606, note.

[3] Den *v.* Crawford, 3 Halst. 107. See Prince *v.* Sisson, 13 N. J. 168.

[4] Gorham *v.* Daniels, 23 Vt. 600, decided in 1851. Held generally, that the statute of uses seems to have been adopted in New England. Society, &c. *v.* Hartland, 2 Paine, C. C. 536; Sherman *v.* Dodge, 28 Vt. 26.

14. In Ohio, it is said that uses are not in force, and that the system of conveyancing in use there does not depend upon the statute 27 Hen. VIII., but has taken its form and derives its authority from the State statutes and local usages. A deed, for instance, to P.H., in trust for the heirs and devisees of P. H., was held in that State to create a trust. But still, both by the ordinance of 1787 and the courts and writers upon the law of that State, the conveyances employed there were held to be derived from the statute of uses, and reference is constantly made to the modes of conveyance which had grown up in other States and in England under this statute. Thus it is said: "Our only conveyances are those which originated under the statute of uses; but, in all other respects, our law of real property is the same as if that statute had never been enacted."[1] The ordinance of 1787 prescribed bargain and sale, and lease and release, as the modes of conveying land: "We hold the mere execution and delivery of the deed, without any other ceremony, completes the conveyance. We hold some pecuniary consideration necessary, which was not in a feofment, because, without such consideration, a use could not be raised." And in giving the opinion in Foster *v.* Dennison, Lane, C. J., says: "A deed may be held to operate in any form of conveyance that will carry into execution the lawful objects of the maker, whether the form be feofment, grant, bargain and sale, or release, and the deed may enure as either."[2] A knowledge, therefore, of the law of uses, seems to be requisite in order to understand and apply the forms of conveyance in use in that State. In Iowa, uses are embraced in their code under the term "real estate," and are accordingly inheritable, and subject to the rules of conveyance. And no seals are required to convey lands in that State.[3] In Kansas, where married women are made competent to hold and manage real estate like *femes sole*, a conveyance to A, to the use of B, vests the estate at once in B, although she may be a *feme covert*.[4]

15. In Tennessee, the statute of uses is said not to be in

[1] Walk. Am. Law, 311; Helfensteine *v.* Garrard, 7 Ohio, 275.
[2] Foster *v.* Dennison, 9 Ohio, 124. [3] Pierson *v.* Armstrong, 1 Iowa, 282, 294.
[4] Bayer *v.* Cockerill, 3 Kan. 292.

force; though, in the absence of any form of deed prescribed by statute, any deed good at common law or under the statute of uses would be valid as a mode of conveying lands.[1]

[*153] *16. In New York, essential changes were made in the law regulating real property by the revised code of 1827, and, among other things, in the matter of uses. Previous to that, numerous cases had arisen in which the doctrine of the English statute had been applied. In one it is stated, that as early as 1779, and so on till 1788, when the English statutes were abolished, the form of conveyance in the State was lease and release.[2] In another it is said, that the words remise, release, and for ever quitclaim, or release and assign, will raise a use by way of bargain and sale, and that, by any words amounting to a present contract of sale or bargain, a use is raised which the statute will execute, and that it would be sufficient that a valuable consideration was paid, whether it was expressed or not.[3] In another, the language of the deed was, "For value received, I hereby make over and confirm to, &c.;" and it was held, that this was enough to raise a use, as "the statute there performs the task of the ancient livery of seisin."[4] And in accordance with what has been repeated under the English rule, and that adopted in other States, if the use in a deed of bargain and sale were to another than the bargainee, it would create a trust, and not be a use which the statute would execute.[5] In Jackson *v.* Dunsbagh, the court were inclined to hold, that a future use might be raised by means of a deed of bargain and sale, the use in the mean time resulting to the bargainor, and that a covenant to stand seised may be sustained in this country upon a pecuniary consideration.[6]

17. For the changes in the law of New York as to real property, effected by the revised statutes of 1827, reference is chiefly made to Mr. Lalor's work, presenting the text of the statute, the reviser's notes, and the cases decided under the statute. By that statute, "uses and trusts, except as

[1] Thornt. Conv. 479.

[2] Jackson *v.* Myers, 3 Johns. 388.

[3] Jackson *v.* Fish, 10 Johns. 456.

[4] Jackson *v.* Root, 18 Johns. 79.

[5] Jackson *v.* Cary, 16 Johns. 302; Jackson *v.* Myers, 3 Johns. 388.

[6] Jackson *v.* Dunsbagh, 1 Johns. Cas. 91. But see Jackson *v.* Cadwell, 1 Cow. 622.

authorized and modified in this article, are abolished." The exception relates to * trusts, properly so called; [*154] so that, in terms, uses are abolished. But whatever might have been accomplished by means of uses is effected in the form of statutory provisions incorporated in the act. Among other things, a *grant* is made effectual without livery of seisin. In the language of the revisers, "the new modifications of property which uses have sanctioned are preserved by repealing the rules of the common law by which they were prohibited, and permitting every estate to be created by grant which can be created by devise. And this is the effect of the provisions in relation to expectant estates contained in the first article of this title." [1] The statute confirmed every estate then held as an executed use. Every person who by grant or devise should be entitled to the actual possession of land, and the receipt of the rents and profits in law or in equity, was deemed to have the legal estate therein of the same quality, &c., as his beneficial estate. A contingent remainder in fee may be created on a prior remainder in fee in certain cases mentioned. Freeholds might be created *in futuro*, and a fee might be limited on a fee, upon a contingency within prescribed limits as to perpetuity.[2] And now conveyances are made by grant simply.[3] The law of Alabama is substantially like that of New York. Where a deed was to one with a use, trust, or confidence, for another, it was accordingly held to create in the beneficiary the same estate as if the deed had been made directly to him.[4]

18. All that it is proposed to add upon the application of uses in American conveyances is to recapitulate from Thornton's treatise the forms of deeds usually employed, remarking that it may not be a fair inference that the doctrine of uses would be inapplicable in any State where they are not declared not to exist, because no case has arisen in the courts of the

[1] Lalor, Real Est. 119, 124.

[2] Lalor, Real Est. 86, 92, 154; Coster *v.* Lorillard, 14 Wend. 265–399, where the whole subject is considered.

[3] Wms. Real Prop. 153, Rawle's note.

[4] You *v.* Flinn, 34 Ala. 411–414; Horton *v.* Sledge, 29 Ala. 496.

State to test the question, or because a form of deed not known under the statute of uses may have been declared by the statute of a State sufficient to convey lands. It may be stated, then, generally, that the form of deeds in ordinary use in the following States is substantially that of bargain and sale: Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, [*155] Minnesota, Mississippi, * Missouri, New Hampshire, New Jersey, Pennsylvania, Vermont, and Virginia. In Massachusetts, as already stated, the deed in use is like the old charter of feofment, with words of bargain and sale added, and the use declared after the *habendum*. By statute, deeds of release and quitclaim are effectual to pass all the grantor could pass by bargain and sale; and a similar provision is found in the statutes of Michigan, Maine, Minnesota, and Indiana. In California, the simple requisite is that the instrument should be a deed. In Iowa, no deed is required; nor is a deed required in Kentucky. It is sufficient if the conveyance be in writing. The statute of Rhode Island recognizes deeds of bargain and sale, lease and release, and covenant to stand seised; but it seems to be immaterial what form is adopted. In South Carolina, a form is prescribed, but other forms are not interdicted. Tennessee has a prescribed form.[1] In Texas, "bargains and sale and other conveyances" are recognized by statute, while a form of release is given which does not contain any declaration of use. In Wisconsin, no form of deed is prescribed.[2]

19. It may be proper to add something to what has already been said upon the subject, how far there may be a covenant to stand seised in this country, where the consideration is wholly a valuable one as is distinguished from what is known as good. It is sustained in Massachusetts, though the consideration be wholly a valuable one.[3] They were both, at first, real covenants; and, in order to be sustained, must be

[1] Code 1858, § 2013.

[2] For authority, the reader is referred to Thornton's treatise, under the heads of the several States above enumerated.

[3] Trafton *v.* Hawes, 102 Mass. 533.

founded upon a consideration good or valid in equity.[1] The reason for the distinction once existing between bargain and sale, and covenant to stand seised, resulting from the enrolment of the former, is quite done away with here, where all deeds are required to be registered, whether of one form or another. In several cases the court have found, as facts *aliunde* from any recited in the deed, that there was a relationship between the grantor and grantee, when it has become necessary to resort to the doctrine of covenants to stand seised to give effect to deeds; and this although there was an express acknowledgment of a pecuniary consideration. In Gale *v.* Coburn, the only relationship was that the grantee had married a *daughter [*156] of the grantor, who had died several years before making the deed, leaving two children who were in no way referred to in the deed.[2] In Emery *v.* Chase, the court held it doubtful whether the deed could be construed a covenant to stand seised, since the grantee was not related to the grantor. "And although," say the court, "deeds for other considerations have sometimes been called covenants to stand seised, and have used the language peculiar to such instruments, yet their legal operation has been of deeds of bargain and sale, as they are found to possess the requisites which belong to this kind of assurance."[3] Although this subject is further treated of hereafter (pp. *616–*618), it may be proper to add here that the English authorities do not seem to favor the idea, that, if a pecuniary consideration alone is mentioned in a deed, a different one, like relationship, may be proved, in order to sustain a conveyance as a covenant to stand seised which might be defective as a bargain and sale.[4] In Maine, this distinction is obviated by holding that a freehold *in futuro* may be conveyed by bargain and sale.[5]

[1] Cornish, Uses, 63.

[2] Gale *v.* Coburn, 18 Pick. 397.

[3] Emery *v.* Chase, 5 Me. 232.

[4] Sugd. Gilb. Uses, 456; Bedell's case, 7 Co. 40; Woods, Inst. 267. But Cornish, Uses, 67, rather favors the above doctrine of Gale *v.* Coburn.

[5] Wyman *v.* Brown, 50 Me. 150; Drown *v.* Smith, 52 Me. 141; Jordan *v.* Stevens, 51 Me. 79.

20. When considering what would be such a relation as to constitute a good consideration, courts have held that that of an illegitimate child or grandchild was insufficient.[1]

21. The reasoning of Jackson, J., in Massachusetts, and Lewis, J., in New York, would lead to the inference, that in this country a covenant to stand seised may be grounded upon a valuable as well as a good consideration; though in the former case, in the language of Jackson, J., "the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of those qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows, that a freehold to commence *in futuro* cannot be conveyed in this mode, as that would be to make the bargainee hold to the use of another until the future freehold should vest."[2]

[1] Cains *v.* Jones, 5 Yerg. 249; Jackson *v.* Cadwell, 1 Cow. 622; Jackson *v.* Sebring, 16 Johns. 515; Co. Lit. 271 b, n. 231, III. 3.

[2] Welsh *v.* Foster, 12 Mass. 93, 96; Jackson *v.* Dunsbagh, 1 Johns. Cas. 96; 4 Greenl. Cruise, Dig. 110, 112, note.

CHAPTER III.

TRUSTS.

SECT. 1. Their Nature, Duration, Qualities, and Incidents.
SECT. 2. Classification of Trusts.
SECT. 3. How created, declared, and transferred.
SECT. 4. Rights, Powers, and Duties of Parties to Trusts.
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* SECTION I. [*157]

THEIR NATURE, DURATION, QUALITIES, AND INCIDENTS.

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5. Use and trust formerly alike.
6. Principles of the statute 27 Hen. VIII. c. 10.
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10. Tyrrell's case, no use upon a use.
11. How far one creating a trust can change or revoke it.

1. THE importance of the law of trusts may be, in some measure, appreciated, when it is considered, if works of good authority in England are to be relied on, that the titles to a vast proportion of the lands in that kingdom are vested in trustees. And although this may not be true to the same extent of this country, it is beyond question that immense interests are involved in trusts here, and that these are increasing every year.[1]

2. Something answering to trusts in respect to lands in cases where the simple rules of common law were modified

[1] Hill, Trust, 42; Tud. Lead. Cas. 276; Co. Lit. 290, Butler's note, 249, § 15.

by the action of the chancellor, where equity required his interposition to enforce agreements in respect to such lands, was recognized in the English law, probably as early as A. D. 920.[1]

3. The mode by which the enforcement of a trust was at last sought to be accomplished was by means of a writ, framed by the chancellor, called a writ of Subpœna, compelling the party charged with a trust to come into court, and answer to the articles which were contained in the petition upon which the subpœna was issued. If there was a trust, the party was obliged to disclose it upon oath; and the court thereupon decreed that he should carry it into execution.[2]

4. It was because these collateral obligations could not be taken cognizance of as interests in lands by the common law, and were cognizable as such only in courts of equity, that they took the name of *equitable* to distinguish them from *legal* estates.[3]

5. Although, as has been shown in the preceding chapter, the equitable or beneficial interest which one man had [*161] in land, * which in the eye of the common law belonged to another, was commonly called a use, it was also often called a trust, these being, in fact, convertible terms prior to the statute of 27 Hen. VIII.; and the word "trust" is mentioned even in that statute, as well as "use."[4] These terms, however, were at that time understood to indicate equitable interests of somewhat different natures. If the interest was a permanent enjoyment of the benefit or profits of the land, separate from the possession, it was called a *use*. If it was for a temporary purpose, as the raising of a sum of money out of the land, it was a *trust*. And in this sense, though every use was a trust, every trust was not a use.[5]

6. The rules which regulate trusts are based upon the

[1] Co. Lit. 290 b, Butler's note, 249, § 15; Gilbert, Uses, Sugd. ed. 2, 3.

[2] Ibid.; 1 Spence, Eq. Jur. 338.

[3] Ibid.

[4] 2 Crabb, Real Prop. 512; 2 Bl. Com. 327; 1 Prest. Est. 184.

[5] 1 Prest. Est. 185; Cornish, Uses, 14, 15; 1 Spence, Eq. Jur. 448, who distinguishes them thus, — the one "an use or permanent trust," the other "a temporary, special, or active trust."

principles of a refined moral duty between persons who stand in the relation of confidence to each other. The statute of 27 Hen. VIII., c. 10, has been pretty fully considered in the preceding chapter.[1] It classes "trusts," "uses," and "confidences" in one category, and undertakes to apply the same remedy to all by uniting the legal with the equitable interest into a new legal estate. But it became apparent, upon applying this statute, that there were cases where this could not be done without defeating the obvious provisions of the trust, or extending the language of the statute beyond its necessary meaning. While, therefore, full effect was given to the statute, where the seisin could be united with the use, or where, in other words, the use was *executed* by the statute, it was accordingly done, and only one interest or estate thereupon remained. But where the use could not be thus executed, the legal estate was necessarily left as at common law. But equity, perceiving that to allow the holder of the legal estate to have the beneficial use of it was contrary to the intention of the parties, interposed to hold the tenant of the legal estate a trustee for him who was entitled to
* the beneficial use of it; and the consequence was, [*162]
that, while one party had a right to the seisin and possession of land as at common law, equity regarded him for whose use the land was designed as the rightful owner thereof, and in this way there early grew up a double ownership of lands thus situated, the *legal* and the *equitable* one.

Thus it was held, that as a use was executed by uniting the seisin which was in one with the use which was in another, and as there could be no seisin, properly speaking, of a use, if there were a feofment to A, to the use of B, to the use of C, the seisin in A passed to and was executed to the use in B. But as only a use was given to B, it was held that the seisin which the statute united to the use in B did not pass from him to C, and it consequently left the seisin in B, as the legal owner. In order, however, to give effect to the second part of the limitation, equity came in and required B to hold the estate to the use of C, and called this a *trust*. So

[1] *Ante*, pp. *108–*156.

it often happened that lands were given to one to do certain acts in respect to the same for the benefit of a third person, a *feme covert*, for instance, which required him to hold the seisin and legal estate. In such a case, inasmuch as to execute the use in the one for whose benefit the land was granted or devised would defeat the purposes of such grant or devise, the seisin was held to remain in the grantee or devisee, while equity required him to perform the duty or confidence imposed upon him under the name of a trust. So, where land is given to A for a term of years in trust for B, it is a technical trust, since the statute of uses only executes a use in cases where a seisin is united with it.[1] And where the grant was to A and his heirs to receive the rents and pay them over to B and his heirs, it was held to be a trust which descended to the heirs of B, and that B could not convey the land.[2]

7. A trust may, therefore, be defined as a use, which, though lawful in itself, the statute does not operate upon to execute in the *cestui que use*, whereby the legal estate is in [*163] one, while another * has a right to a beneficial interest in and out of the same,[3] the first being termed a *trustee*, the other a *cestui que trust*. Thus, for illustration, a grant or devise to A in trust for B, or to permit B to take the rents and profits, would be an executed use in B, unless B was a *feme covert*, when, in order to carry out the grantor's or devisor's intent, it would be a trust, or use not executed.[4] If, on the contrary, the trust is created for some special purpose, as to convey the estate, or exercise control over it, such as paying the taxes, or making repairs upon it, and the like, it is a trust which the statute will not execute, and of course

[1] 2 Sharsw. Bl. Com. 335–337, and notes; 2 Crabb, Real Prop. 507; 1 Prest. Est. 190; Cornish, Uses, 27–29; 1 Spence, Eq. Jur. 466; Id. 490; 1 Sand. Uses, 266; Hopkins *v.* Hopkins, per Lord Hardwicke, 1 Atk. 591; 1 Eq. Cas. Abr. 383; Fletch. Trust. 27; Ashhurst *v.* Given, 5 Watts & S. 327.

[2] Harlow *v.* Cowdrey, 109 Mass. 183.

[3] Tud. Lead. Cas. 276; 2 Bl. Com. 336; 1 Prest. Est. 186; 1 Spence, Eq. Jur. 494; Fisher *v.* Fields, 10 Johns. 505.

[4] 1 Prest. Est. 190; Tud. Lead. Cas. 268; Doe *v.* Collier, 11 East, 377; Co. Lit. 290 b, n. 249, § 6; 1 Eq. Cas. Abr. 382; Harton *v.* Harton, 7 T. R. 653; Jones *v.* Bush, 4 Harring. 1; Ayer *v.* Ayer, 16 Pick. 327, 330; Doe *v.* Biggs, 2 Taunt. 169.

it leaves the legal estate in the trustee.[1] The following definition of trusts, as given by a writer, it will be perceived, corresponds nearly with that of uses before the statute, namely: "A right in the *cestui que trust* to take the profit of lands, whereof the legal estate is vested in some other person, and to compel the person thus seised of the legal estate to execute such conveyances of the land as the person entitled to the profits shall direct, and to defend the title to the property."[2] Mr. Sanders defines a trust to be "a right on the part of the *cestui que trust* to receive the profits, and dispose of the lands in equity."[3] And this is adopted by Ch. Kent.[4] And if there be no determinate person who has a right to claim as a beneficiary, it wants an essential element of a trust, because a court of equity has no means of knowing how to cause it to be executed or enforced. But this rule, though a general one, will be found hereafter to be essentially qualified in respect to what are called charitable trusts, which are regulated by the statute of Elizabeth.[5]

8. Some of the same causes which operated to produce so general an application of uses before the statute facilitated the introduction of the system of trusts. There were so many occasions when a necessity existed for creating fiduciary relations in respect to real property in order to effect the wants and wishes of its owners, while the common law afforded no adequate * means for properly enforc- [*164] ing them, that there was a ready acquiescence in the action of the court of chancery when it practically resumed its jurisdiction over estates through the persons and consciences of those who held them. This it did by re-creating an equitable interest in real estate, distinct from the concurrent legal estate, after the very same exercise of jurisdiction had been solemnly denounced by the legislature, and extinguished.[6]

9. This was accomplished, as has already been stated, by

[1] 2 Crabb, Real Prop. 509; Wms. Real Prop. 134; 1 Eq. Cas. Abr. 383; Hill, Trust. 232; 2 Sharsw. Bl. Com. 335, n.; Willis, Trust. 21; Doe *v.* Homfray 6 A. & E. 206.

[2] 1 Spence, Eq. Jur. 496.

[3] 1 Sand. Uses, 267.

[4] 4 Kent, Com. 314.

[5] Levy *v.* Levy, 33 N. Y. 104, 107, 122.

[6] 1 Spence, Eq. Jur. 491, 493.

discovering that there were cases of uses, which, because they could not be executed, were considered as not coming within the statute, and these included trusts of chattel estates in land. And when the courts of common law had determined that a use could not be executed upon a use,[1] there was obviously no want of materials out of which to frame a system, for which these courts had already rules and precedents in the doctrine of uses in exercise before the statute, with which they were familiar. Among those who were the most active in building up, and giving form, symmetry, and consistency to, the system of trusts, was Lord Nottingham, who was chancellor in 1675.[2] Another class of uses which were held not to come within the statute, and were consequently seized upon by courts of equity in building up the system of trusts, were those which were *implied*. Thus where land was purchased in the name of one, but the consideration was paid by another, which was explained in a former chapter.[3] And to these were soon added cases where the legal title to land was in one by fraud or accident, and the equitable claim to the same was in another; as where, for instance, one, who had been intrusted with money by another to purchase for him an estate, should take the deed in his own name.[4]

10. The case of Tyrrel, above referred to, deserves [*165] a *fuller notice from the important part it had in establishing the system of trusts. It arose about twenty years after the act of 27 Hen. VIII. under these circumstances, and was decided in a court of common law. Jane Tyrrel, for a valuable consideration paid by her son and heir, bargained and sold her land to him, *habendum* to her use during life, and after her death to the use of himself and the heirs of his body, and, for default of such heirs, to the use of his own right heirs. As this conveyance was by bargain and sale, it could only take effect, in the first place, by raising a use in favor of the son to which the law united the mother's seisin, and executed the use in the son. Now, to give effect to

[1] Tyrrel's case, Dyer, 155.

[2] 2 Bl. Com. 336; Co. Lit. 290 b, note 249, § 15; 1 Spence, Eq. Jur. 494; Wms. Real Prop. 134.

[3] *Ante*, p. *101

[4] 1 Spence, Eq. Jur. 452, 467.

these several estates by the statute of uses, the operation must have been this: When the seisin had reached the son, there was a use then waiting in J. T., and the seisin in the son must pass back again to J. T. to be executed in her for life. And, at her death, a use was then *in esse* in the son, which would draw the seisin and execute the use in him. But the court repudiated the idea of the seisin shifting about in this manner; for if, when once executed, it could pass to a third person, it might to fifty in succession; and besides, the statute speaks of being "seised of *lands* and *tenements*" to the use of another. In an opinion of three lines, they held that, the use being executed in the son, the uses in the *habendum*, so far as they could be affected by the statute, were void, *use ne poit estre engendre de use*, &c. This became the settled law. But, as remarked by Mr. Sugden, "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to."[1] And Mr. Watkins says: "About the time of passing the statute of uses, some wise man, in the plenitude of legal learning, declared there could not be a use upon a use. This very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted, and still is adopted, and upon it (at least chiefly) has been built up the present system of uses and trusts."[2] And it may be added, that the doctrine has become an elementary one in this country, where it has not been changed by statute. Thus it is assumed that a use limited upon a use is not executed or affected by the statute of uses. The second is valid as a trust.[3] With this explanation, the reader will be ready to *apply the language of Lord Hardwicke in the case [*166] already cited: "By this means, a statute made upon great consideration, introduced in a solemn and pompous manner by this strict construction, has had no other effect than to add, at most, three words to a conveyance."[4]

[1] Gilb. Uses, Sugd. ed. 348. [2] Watk. Conv. Introd. xx.

[3] Croxall *v.* Shererd, 5 Wallace, U. S. 282. See Wyman *v.* Brown, 50 Me. 157.

[4] Hopkins *v.* Hopkins, 1 Atk. 591 In Tyrrel's case, the son became trustee of J. T. for life. 1 Prest. Abst. 142.

11. As trusts are more commonly than otherwise voluntary dispositions of estates by those creating them, questions have arisen whether and how far it is competent for one who grants an estate in trust to revoke the grant, or essentially change the objects, purposes, or details of the trust as declared thereby. And to this extent the question seems to have been settled. If the trust is created for the benefit of the grantor as well as the *cestui que trust*, as, for instance, by a debtor for the benefit of his creditors, and, before any of his creditors have assented or become parties to the conveyance, he convey the estate upon other and different trusts, it would be too late for the creditors under the first deed to interpose to prevent the execution of the new trusts.[1] But if a deed of trust be actually executed and delivered to the trustee, creating a trust in favor of another, as, for example, for a future husband or wife, or for children to be born, it would not be competent for the grantor or settler to revoke such trust, nor would a court of equity require it to be done, even though such settlement might as to creditors be void under the statute of Elizabeth. Thus, where A, being in debt and unmarried, conveyed his estate to B in trust, to pay and apply the income for the benefit of the grantor during his life, and after his death for the benefit of his children if he left any, he then being unmarried, and he subsequently married and undertook to revoke this trust, and applied to the court to aid him in so doing, the court held it to be a trust by which he was bound, and dismissed his bill.[2] And a like doctrine, that such a trust is irrevocable, was established in respect to stock transferred to trustees by a single woman, in trust for herself till married, then in trust for her husband if she married, and after his death in trust for her children, if any.[3] But in a case in New Jersey, where there was a voluntary deed of trust executed under the supposition that it was revocable and intended to be so, but no such clause was inserted in the deed, the court, under the circumstances that it was unadvised and improvident, set the deed aside, although the

[1] Wallwyn *v.* Coutts, 3 Mer. 707; Bill *v.* Cureton, 2 M. & Keene, 511.

[2] Petre *v.* Espinasse, 2 M. & Keene, 496.

[3] Bill *v.* Cureton, 2 M. & Keene, 503. See also Story, Eq. § 371.

infant children of the grantor were beneficiaries under the deed. And they cite several modern cases from the English reports, where the old rule on the subject is said to have been relaxed.[1] But in a recent case in Connecticut, where one voluntarily deposited money in trust for an object of his bounty, it was held to be irrevocable.[2] So where a husband and father, who was intemperate in his habits, in order to guard against these, made a trust-deed, 1st, to pay his debts; 2d, to pay him a certain sum annually; 3d, to pay the surplus income to his wife; 4th, after his death to sell the estate, and pay the proceeds to persons named. Having reformed, he applied to the court to set aside the deed; but they held it was irrevocable.[3]

[1] Garnsey *v.* Munday, 9 C. E. Green, 243. Among the cases cited were Hall *v.* Hall, L. R. 8 Ch. App. 430; Forshaw *v.* Welsley, 30 Beav. 243.

[2] Minor *v.* Rogers, 41 Conn. 512. [3] Ritter's Appeal, 59 Penn. St. 9.

SECTION II.

CLASSIFICATON OF TRUSTS.

1. Trusts general or simple, and special.
2. Simple trusts described. To preserve remainders.
3. Distinction between executed uses and trusts.
4. Uses in favor of *femes covert*, when trusts.
5. Cases implying active trusts.
6. Trusts changing to executed uses.
7. Special trusts distinguished from powers.
8. Implied, resulting, and constructive trusts.
9. Trusts never implied where one is expressed.
10. Resulting trusts distinguished from constructive.
11. Instances of implied trusts.
12. Difference between resulting uses and resulting trusts.

12 *a*. Classification of resulting trusts.

13. Instances of resulting trusts.
14. Upon conveyance to wife or child, no resulting trust.
15. When a trust results from consideration paid.
16. Of parol evidence to rebut resulting trusts.
17. Of parol evidence to establish a resulting trust.
18. Constructive trusts in respect to estates wrongfully held.
19. Ground on which constructive trusts rest.

20, 21. Instances of constructive trusts.

22, 23. Where trusts may be raised without writing.

24. Statute of uses does not reach terms for years.
25. *Executed* and *executory* trusts defined.
26. How modern trusts have been built up.
27. Double character, *legal* and *equitable* in every trust.
28. The *trust* in *equity* answers to the *land* in *law*.
29. Same general rules as to ownership of legal and equitable estates.
30. Rule in Shelley's case applied in equity.
31. Equitable estates descend, &c., like legal estates.

32, 33. How far equitable estates are subject to debts.

34. Trusts like legal estates as to duration, &c.
35. Same rule as to perpetuities in trusts and legal estates.
36. Statute of limitations applicable to trusts.
37. Length of possession by trustee no bar.
38. Constructive trusts exceptions to the last rule.
39. Trusts may be barred by adverse possession.

40, 41. Trusts not subject to rules growing out of tenure.

42. What in respect to trusts answers to seisin.
43. Estates of inheritance in trusts created without "heirs."
44. Trustee's estate measured by nature of the trust.
45. Rules applied by courts in determining the estate of a trustee.
46. When a vendor becomes trustee to his vendee.

47. When equity gives to personalty the character of realty.
48. Contingent remainders of trusts, when not defeated.
49. Of dower and curtesy in trusts.

1. THE first classification of Trusts is into general or simple and special trusts.

2. A simple trust is one where property is vested in one upon trust for another, the nature of the trust not being expressed, but left to the construction of the law. The legal estate is merely vested in the trustee: the *cestui que trust* being in equity entitled to the rents and profits, has power to dispose of the lands, and to call upon the trustee to execute the requisite conveyances.[1] For the reason, therefore, already stated (p. *163), if a grant were made to A in trust for an unincorporated association, incapable of taking and holding lands, the grant will be void for want of a known competent *cestui que trust*.[2] An instance of this class of trusts is a limitation to A and his heirs to the use of B and his heirs, to the use of or in trust for C and his heirs. B takes the legal estate, but becomes trustee for C. Among the trusts included under this class were those heretofore in use to preserve contingent remainders, which will be explained hereafter. It will be sufficient for the present to state, that, as the law stood, a contingent remainder required a precedent estate of freehold to support it; and if this by any means was destroyed, by forfeiture for instance, before the contingency happened upon which the remainder was to vest, the latter was defeated.[3] To guard against a possibility of this kind, it was common to appoint *trustees, to whom a freehold [*167] estate was limited in remainder for the life of the precedent freehold tenant, to commence if and when his estate determined during his life. So that there was always some one, tenant of the freehold, to sustain the contingent remain-

[1] Lewin, Trusts, 2d ed. 23; Tud. Lead. Cas. 274; Wms. Real Prop. 135; 2 Flint, Real Prop. 786.

[2] German Association *v.* Scholler, 10 Min. 331.

[3] This is altered now by statute in several of the States, as well as in England. Wms. Real Prop., Rawle's ed. 233, and note; 2 Greenl. Cruise, Dig. 270, note.

der. Thus a limitation was made to the use of A for life, remainder to the use of C and D and their heirs during the life of A, remainder to the use of the unborn son of J. S. The legal estate thus limited to the trustees during the life of the tenant for life is a good remainder vested in them, under which they will have such a right of entry in case of any forfeiture or tortious alienation by the tenant for life as will support the contingent remainder, expectant on his decease.[1]

3. But it is often difficult to determine, in a given case, whether the estate limited is a legal or equitable one, as may be illustrated by the following adjudged cases. A testator devised unto and to the use of A, to the use of or in trust for B. It was held, that inasmuch as here was a use in A, there could not be a second use in B, and therefore that A took the legal estate, and B an equitable one only.[2] But where the testator devised to A and his heirs to the use of B and his heirs, or in trust for B and his heirs, to receive the rents, &c., at it made no difference whether the word "use" or "trust" were used,[3] it was held that the legal estate was in B by force of the statute.[4] The question in those cases is, In whom is the first use, or to whom is it limited? Thus, if an estate be limited to A and his heirs, to the use of A and his heirs, in trust for or to the use of B and his heirs, the first use being to A, the grantee, and there being a use or benefit over in favor of B, A is held to be a trustee, and B the *cestui que trust.* But if it had been to A and his heirs, to the use or in trust for B and his heirs, A would, in fact, have taken nothing, unless he was, by the terms of his deed, charged with some certain duty in regard to the estate, which required him to

[1] 2 Flint, Real Prop. 787; Fearne, Cont. Rem. 326; Vanderheyden *v.* Crandall, 2 Denio, 9.

[2] Wms. Real Prop. 134, where the illustration is a feofment instead of a devise, the same rule being applicable to each. Moore *v.* Shultz, 13 Penn. St. 98; 2 Jarm Wills, 198; Tud. Lead. Cas. 268; Doe *v.* Passingham, 6 B. & C. 305; 1 Sugd. Pow. 3d Am. ed. 168–171; 2 Smith, Lead. Cas. 5th Am. ed. 454.

[3] Doe *v.* Collier, 11 East, 377; 2 Jarm. Wills, 199; Kay *v.* Scates, 37 Penn St. 37; Webster *v.* Cooper, 14 How. 488.

[4] Broughton *v.* Langley, Ld. Raym. 873; Right *v.* Smith, 12 East, 455; Doe *v.* Bolton, 11 A. & E. 188; Ramsay *v.* Marsh, 2 M'Cord, 252; Welch *v.* Allen, 21 Wend. 147; Jenney *v.* Laurens, 1 Spear, 356.

retain the seisin.[1] The legal estate, in such cases, vests in him to whom, by the words of the instrument, the use is first limited.[2] Though where a devise has been made to A and his heirs, to the use of B and his heirs, whether or not the estate is to be executed in * B may depend upon a [*168] construction of the whole will as to the intent of the testator in that respect.[3]

4. The question whether the person named as trustee shall be construed to have the legal estate, or it shall be transmitted through him to the *cestui que trust*, is often determined by the fact that he is charged with duties in respect to the property which require that the legal estate should be vested in him; as, for instance, to dispose of the property, or pay the rents over to the *cestui que trust*, or apply them in the maintenance of the *cestui que trust*,[4] or to manage with the estate as the trustee should think most for the interest of the *cestui que trust*, and the like,[5] or to pay the rents to a married woman, or to suffer her to receive the rents, or pay annuities out of the rents, &c.[6] And though it was, for a while, maintained as law in Pennsylvania, that a use will be held to be executed in a *cestui que trust*, where he is to have the beneficial interest in the estate, except in cases of *femes covert* and others under a disability,[7] it is now established, that if a trust is created, in which the trustee has an active duty to perform, like receiving and paying the rents to the *cestui que trust*, it

[1] Price *v.* Sisson, 13 N. J. 173, 174; 2 Bl. Com. 336; Hill, Trust. 230, 235; Hayes *v.* Tabor, 41 N. H. 521, 525, 526.

[2] Attorney-General *v.* Scott, Cas. temp. Talb. 138; Croxhall *v.* Sherrerd, 5 Wall. 282.

[3] Gregory *v.* Henderson, 4 Taunt. 775, by Gibbs, C. J.; Harton *v.* Harton, 7 T. R. 653, by Lord Kenyon, C. J.

[4] 2 Jarm. Wills, 198; Posey *v.* Cook, 1 Hill (S. C.), 413; Morton *v.* Barrett, 22 Me. 257; Norton *v.* Leonard, 12 Pick. 152, 158; Newhall *v.* Wheeler, 7 Mass. 189; Schley *v.* Lyon, 6 Ga. 530; 1 Prest. Est. 185; Co. Lit. 290 b, n. 249, § 6; Tud. Lead. Cas. 268, 269; Plenty *v.* West, 6 C. B. 201; 1 Cruise, Dig. 385; Doe *v.* Homfray, 6 A. & E. 206; Doe *v.* Biggs, 2 Taunt. 109.

[5] Bass *v.* Scott, 2 Leigh, 356; Exeter *v.* Odiorne, 1 N. H. 232.

[6] 2 Flint, Real Prop. 768; 2 Jarm. Wills, 204; 1 Spence, Eq. Jur. 466; Pullen *v.* Rianhard, 1 Whart. 514, 520; Lancaster *v.* Dolan, 1 Rawle, 231; Nevil *v.* Saunders, 1 Vern. 415; Jones *v.* Say and Seal, 1 Eq. Cas. Abr. 383; Harton *v.* Harton, *sup.*

[7] Kuhn *v.* Newman, 26 Penn. St. 227; Kay *v.* Scates, 37 Penn. St. 36.

does not become an executed use, but is properly a trust, and vests in the trustee; thus in effect overruling, to this extent, the cases of Kuhn *v.* Newman, and Kay *v.* Scates, cited *ante*.[1] It is held that trusts in favor of *married* women, or of women *about to be married*, are such as courts take care of according to the rules of equity. This defines the duration as well as the character of the trust.[2]

[*169] Though the proposition may be regarded as an almost * universal one, that a grant or devise to one to permit a married woman to receive the rents for her separate use is considered as creating a trust in her favor, and not an executed use, and courts are always liberal in construing such a limitation a trust,[3] yet it may be controlled by the language of the grant or devise. Thus, where the conveyance of property was to A, in trust for B, who was a *feme covert*, "with power to said B to dispose of the same by an instrument in the nature of a last will," there was held to be an executed use in B, and not an existing trust.[4]

5. To these may be added cases where the trustee named is to permit the beneficial owner to receive the *net* rents and profits, implying that something is to be paid by the trustee himself out of these, the balance only going to the *cestui que trust*,[5] or where the trustee is to sell and convert real estate into money,[6] or where the duty is imposed of having the rents and profits accumulate, requiring care and diligence on the part of the person named as trustee.[7]

6. There are, moreover, some trusts which partake successively of the character of active trusts, in respect to which the trustee is clothed with the legal estate, and of executed uses where it passes to the one beneficially intended in it, accord-

[1] Bell's Estate, Barnett's Appeal, Opinion of Read, J., 46 Penn. St. 398, who cites in support of his doctrine Cleveland *v.* Hallett, 6 Cush. 403; Fay *v.* Taft, 12 Cush. 448; *In re* Birlet's Estate, 32 L. Journal, Ch. 439; Pullen *v.* Rianhard, 1 Whart. 521; Smithwick *v.* Jordan, 15 Mass. 113.

[2] Steacy *v.* Rice, 27 Penn. St. 75; Bush's Appeal, 33 Penn. St. 85; Lines *v.* Darden, 5 Flor. 78.

[3] Harton *v.* Harton, 7 T. R. 653; 1 Cruise, Dig. 385; Nevil *v.* Saunders, 1 Vern. 415; Magniac *v.* Thompson, 1 Baldw. C. C. 63; 2 Flint, Real Prop. 796; Williman *v.* Holmes, 4 Rich. Eq. 495.

[4] Ware *v.* Richardson, 3 Md. 505.

[5] Tud. Lead. Cas. 269.

[6] Cooper *v.* Whitney, 3 Ill. 95.

[7] 2 Flint, Real Prop. 802

ing to the nature and terms of the limitation. Thus it may be incumbent upon the trustee to dispose of the rents in a particular manner during the life of A B, and then the trust may so change as to be executed in a new *cestui que trust*.[1] A trust of this character would be a devise to trustees and their heirs to receive the rents and support the devisor's son till he was twenty-one, and then over to him. In such a case it was held * that the legal estate vested [*170] in the trustees till the son was of age, and then was executed in him.[2] The doctrine applied in these cases is, that although the limitation of the estate to one be such as would be executed in another as the *cestui que trust*, if the trustee named was to be merely passive, yet, if he have an active duty to do which requires him to hold the legal estate for a term of time, he will be considered as seised thereof accordingly, so long as it shall be necessary, and it will then be executed in the *cestui que trust*,[3] upon the principle that trustees only take so much of the legal estate as the purposes of the trust require.[4]

7. Most if not all the trusts above mentioned were created by the act of the party who originally had dominion over the property. And some of them come under the second class of trusts known as special, wherein a trustee is interposed for the execution of some purpose particularly indicated, and is not a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the intention of the settler.[5] Among these special trusts is the common one of a devise of lands to one's executors to sell, where the devisees take an estate in trust in the same. And this is noticed here to distinguish it from the case where the devise is that the executors shall sell, or that the lands shall be sold by them. In the latter case, the executors take no estate, but

[1] Co. Lit. 290 b, 249, § 6; Ackland *v.* Lutley, 9 A. & E. 879; Tud. Lead. Cas. 270; Blaker *v.* Anscombe, 1 B. & P. N. R. 25; Robinson *v.* Gray, 9 East, 1.

[2] 2 Flint, Real Prop. 802.

[3] Tud. Lead. Cas. 269, 270; Doe *v.* Field, 2 B. & Ad. 564; Doe *v.* Ewart, 7 A. & E. 636; 1 Prest. Abst. 143, 144; Upham *v.* Varney, 15 N. H. 462; Doe *v.* Barthrop, 5 Taunt. 382; Adams *v.* Adams, 6 Q. B. 860.

[4] Barker *v.* Greenwood, 4 M. & W. 421; Adams *v.* Adams, 6 Q. B. 860.

[5] Lewin, Trusts, 2d ed. 23.

merely a *power* of sale. And this distinction has been recognized since the time of Henry VI.[1] Thus where trustees were by will authorized to sell, &c., with full power to execute any deed or deeds, &c., it was held, that the legal estate did not vest in the trustees.[2] This distinction is
[*171] sometimes very nice; but it may * be laid down, perhaps, as a general rule, that where a trust is not expressly created by a will, and the duty to be performed may be sufficiently accomplished by the exercise of a bare power or authority, a bare power or authority only will be construed to be created.[3]

8. Implied trusts, or those created by operation of law, have already been mentioned as existing independently of the statute, and as therefore not to be executed in the *cestuis que trust* by force of it. Trusts thus created are distinguished as *implied*, *resulting*, and *constructive;* though it may be remarked in passing, that courts of law do not notice resulting trusts.[4] Nor are resulting trusts ever executed by the statute, or united with the legal estate so as to attach the seisin to them. They are, in this respect, excepted out of the statute.[5]

9. It should also be borne in mind, that the law never implies a trust where there is an express one, such as is declared by word or writing.[6] It was accordingly held, that where A, without any consideration actually paid, made a deed to B, no trust would result to the grantor if a consideration was acknowledged, or a use was limited in the deed.[7]

10. Implied or resulting trusts must consequently arise from the *act* of some party having the beneficial ownership of the property, while all other trusts which are not express are considered as *constructive*, and are, as a general rule, imposed *in invitum* upon the person who is held to be a trustee.[8] It

[1] 2 Jarm. Wills, Perk. ed. 206, and cases cited in note; Co. Lit. 113 a; Sugd. Pow. 106; 1 Greenl. Cruise, Dig. 384, note; Fletch. Trust. 13; Houell *v.* Barnes, Cro. Car. 382.

[2] Fay *v.* Fay, 1 Cush. 93.

[3] Fletch. Trust. 11.

[4] Thomson *v.* Peake, 7 Rich. 353.

[5] Nightingale *v.* Hidden, 7 R. I. 121.

[6] 1 Spence, Eq. Jur. 496; Dennison *v.* Goehring, 7 Penn. St. 175; Co. Lit. 290 b, note 249, § 8.

[7] Graves *v.* Graves, 9 Fost. (N. H.) 129; Van der Volgen *v.* Yates, 5 Seld. 219; Farrington *v.* Barr, 36 N. H. 86.

[8] 1 Spence, Eq. Jur. 509.

is hardly necessary to add, what must be a natural inference from the preceding propositions, that no estate can arise by implication to defeat an estate which is expressly limited in terms.[1]

11. Among the cases illustrating what is meant by an *implied* trust is that of a testator directing his estate to be sold for the payment of his debts, or charging it with such payment, and the like. In such a case, the law fastens a trust upon the estate; and whoever takes it by descent or devise is bound as trustee to do whatever is necessary to accomplish the purposes *declared by the testator.[2] Another case [*172] would be the familiar one of a sale of land, where the vendor, until the deed is executed and delivered, becomes the trustee of the purchaser,[3] though the latter cannot exercise the rights of a *cestui que trust* until he shall have paid the whole agreed purchase-money.[4] Nor, since the statute of frauds, can such a trust be regarded or enforced, unless the agreement be in writing, and signed by the party to be charged.[5] But where a father completed a purchase made by his son by paying the balance of the purchase-money, and took a deed to himself, he was held thereby to substitute himself as trustee in place of the vendor, and to be chargeable as such to the son.[6]

12. What has previously been said in respect to the character and creation of resulting uses[7] applies equally to resulting trusts[8] with one exception, where equity applies a more liberal rule to raise a resulting trust than it did to raise a use. Thus, in the case of a bargain and sale, it would be effectual to pass an estate to the bargainee if the consideration of a farthing were paid, inasmuch as the use thereby raised in his favor is executed in him; whereas, if the consideration were

[1] 1 Prest. Est. 191.

[2] 1 Spence, Eq. Jur. 509; Lewin, Trusts, 2d ed. 66.

[3] Willis, Trust. 56; Jackson *v.* Morse, 16 Johns. 197; Bowie *v.* Berry, 3 Md. Ch. Decis. 359.

[4] Wms. Real Prop. 137; Conner *v.* Lewis, 16 Me. 268; 1 Spence, Eq. Jur. 509; 2 Flint, Real Prop. 775.

[5] 2 Flint, Real Prop. 800, 814; Harris *v.* Barnett, 3 Gratt. 339.

[6] Magee *v.* Magee, 1 Penn. St. 405.

[7] *Ante*, pp. *102, *132–*138.

[8] 1 Spence, Eq. Jur, 510; Willis, Trust. 57, 58.

not something substantial, equity would interpose and hold the bargainee, though the owner of the legal estate, as a trustee of the bargainor, and would compel him to reconvey the estate to the bargainor.[1] To create a resulting trust, the money of the *cestui que trust* must be used in purchasing the estate in which the trust is claimed.[2] But any substantial consideration paid by the grantee would be sufficient to repel the presumption of a resulting trust.[3]

12 *a*. Lord Hardwicke mentions three classes of resulting trusts, or such as arise by implication of law, and do not come within the statute of frauds, which requires trusts to be manifested in writing: 1st, where the estate is purchased in the name of one, but the money is paid by another; 2d, where the trust is declared in part only, the residue remaining undisposed of; and 3d, in certain cases of fraud. And parol evidence is competent to show collateral facts from which a trust may be held to result.[4]

13. Particular cases will serve to illustrate and limit the application of the general doctrine of resulting trusts. [*173] Thus, if *there be a devise or grant of an estate in trust, the income thereof to be applied to certain purposes, and there proves to be a surplus unexhausted after such an application, the devisee or grantee will be held in equity as trustee thereof under a resulting trust, for the heir of the devisor or of the grantor, unless it is expressly given to the trustee.[5] So where land was devised to A in trust for a certain church so long as it continued, upon its ceasing to exist it was held that the trustee thereafter held it by a resulting trust for the benefit of the testator's heirs.[6] So where there is a devise of the income of an estate to one when he shall be twenty-one years of age, the intermediate income will result to the heir of the devisor.[7] So if a conveyance be to

[1] 1 Spence, Eq. Jur. 467; Willis, Trust. 57, note; Hill, Trust. 107; *ante*, p. *134.

[2] Remington *v.* Campbell, 60 Ill. 516.

[3] Orton *v.* Knab, 3 Wis. 576.

[4] Lloyd *v.* Spillet, 2 Atk. 148, 150; 1 Greenl. Ev. § 266; Trapnall *v.* Brown, 19 Ark. 39; Fleming *v.* McHale, 47 Ill. 282.

[5] 2 Flint, Real Prop. 804. [6] Easterbrooks *v.* Tillinghast, 5 Gray, 17.

[7] 2 Flint, Real Prop. 804.

one in trust for such trusts as the grantor shall appoint, and he fails to appoint any, or appoints for only a part of the estate, a trust will result to the grantor of the income of such estate, in whole or in part.[1] It may, therefore, be laid down as a general proposition, that it is not necessary, in order to create a trust estate, that a *cestui que trust* should be named who is in being; and in the case cited it was held to be sufficient, if the person designated as the *cestui que trust* were in existence, and could be distinguished at the death of the trustee. The trust may be for the accumulation of the rents and profits of an estate for the benefit of one who may either come into existence during the life of the trustee, or be in existence at the time of his death.[2] Upon a like principle, if the purpose for which an estate is directed to be sold fails, the power of sale is in equity considered as revoked as to all that remains unsold, and that is deemed to belong to the grantor or the heir of the devisor.[3] And if the estate is conveyed for a particular purpose or on particular trusts, which, by accident or otherwise, cannot take effect, a trust will result in favor of the original owner.[4]

14. In cases where a conveyance is made by one to his wife or child, if unadvanced no trust will ordinarily result to the donor, though none be declared in the deed.[5] So the purchase of land in the name of the wife or child raises no presumption of a trust in favor of the purchaser. So where a father purchased land in his children's name, and had a deed made to them, the law presumed it to be an advancement, and not a trust resulting in his favor.[6] On the contrary, the presumption is very strong, if not conclusive, that no trust results to the husband in a question between a wife and the heirs of the

[1] 1 Cruise, Dig. 394, 396; Lloyd *v.* Spillet, 2 Atk. 150; Willis, Trust. 58.

[2] Ashhurst *v.* Given, 5 Watts & S. 327.

[3] Willis, Trust. 59; 2 Flint, Real Prop. 801.

[4] Willis, Trust. 58; 1 Cruise, Dig. 375.

[5] 1 Cruise, Dig. 394, 402; Kingdon *v.* Bridges, 2 Vern. 67; Livingston *v.* Livingston, 2 Johns. Ch. 537; Douglas *v.* Brice, 4 Rich. Eq. 322; Welton *v.* Divine, 20 Barb. 9; Willis, Trust. 61; 1 Spence, Eq. Jur. 511; 2 Flint, Real Prop. 813; Smith *v.* Strahan, 16 Tex. 314.

[6] Cecil *v.* Brann, 28 Iowa, 241.

husband.[1] But the ordinary inference of law may be rebutted by parol evidence of what was done or intended at the time of the purchase being made. Thus, in one case, the husband was allowed to show that, when he had the deed made in the name of his wife, he supposed that at her death it would come to him, and a trust was held to result accordingly.[2] But where the husband paid part of the purchase-money for land conveyed to the wife, but such payment was subsequent to the purchase, and formed no part of the original transaction, no trust resulted in his favor.[3] And where he paid a part of the purchase out of the moneys of the wife, and a part out of his own, and took the deed in the name of a stranger, a trust was held to result to him and his wife, *pro rata*, according to the amount paid by each.[4] And a like rule [*174] * prevails where a grandfather purchases in the name of a grandchild.[5] But whether a trust results or not in favor of a father who purchases land in the name of a son, is a question of intention which may be proved by parol, if it do not contradict the terms of a deed, and the evidence relate to what was contemporaneous with the purchase.[6] Where the purchase was by the son in his father's name, a trust was held to result to the son.[7] The law in such cases presumes in favor of an advancement, subject, however, to be controlled by proof.[8] Where a father paid partly out of his daughter's funds, and partly out of his own, taking the deed to himself, but charged what he had paid as an advancement, it was held to create a resulting trust in favor of his daughter.[9] So

[1] Sunderland *v.* Sunderland, 19 Iowa, 338. See also Shaw *v.* Read, 47 Penn. St. 103; Murphy *v.* Nathans, 46 Penn. St. 508, where the mother took a deed in her daughter's name. Cairns *v.* Colburn, 104 Mass. 274.

[2] Dickinson *v.* Davis, 43 N. H. 647; Wallace *v.* Bowens, 28 Vt. 638. See also Mutual Ins. Co. *v.* Deale, 18 Md. 26; Pembroke *v.* Allenstown, 1 Fost. 107.

[3] Francestown *v.* Deering, 41 N. H. 442.

[4] Hall *v.* Young, 37 N. H. 134.

[5] Co. Lit. 290 b, note 249, § 8; Willis, Trust. 51.

[6] Jackson *v.* Matsdorf, 11 Johns. 91; Baker *v.* Vining, 30 Me. 121; Shepherd *v.* White, 10 Tex. 72; Co. Lit. 290 b, note 249, § 8; Rankin *v.* Harper, 23 Mo. 579; Shepherd *v.* White, 11 Tex. 346.

[7] Howell *v.* Howell, 15 N. J. Ch. 77.

[8] Livingston *v.* Livingston, 2 Johns. Ch. 539, 540; Gee *v.* Gee, 32 Miss. 190; Smith *v.* Strahan, 16 Tex. 314.

[9] Beck's Ex'rs *v.* Graybill, 28 Penn. St. 66.

where a father, for the purpose of making an advancement to a daughter, a *feme covert*, purchased land, and had the deed made to her husband, he agreeing to hold it for her, it was held to create a trust in her favor.[1] If the purchase be made by a husband in the name of his wife, there can be no resulting trust, for the reason that a wife cannot be a trustee for her husband.[2]

15. By far the most numerous class of cases, where the doctrine of resulting trusts has been sought to be applied, are those where the purchase-money for the conveyance of lands has been paid in part or in whole by one man, and the title-deed taken in the name of another. The cases cited below are but a sample of those which are scattered through the books, illustrating the application of this doctrine.[3] If A buys land with his own money, or gives his note and takes a deed to B, it is held that a trust results to A.[4] If one pays only a part of the purchase-money, and another another part, but the definite proportion cannot be fixed, no trust will result. If the fact of the payment being made by the one who claims to be the *cestui que trust* appears upon the deed itself, no other declaration of the trust is requisite. If it do not so appear, the proof that the payment was actually made must be clear, and letters written after the purchase was made may be competent and sufficient to establish the trust. The same rule, as above stated, applies where the deed is taken in the name

[1] Peiffer *v.* Lytle, 58 Penn. St. 389, 391.

[2] Kingdon *v.* Bridges, 2 Vern. 67; Jencks *v.* Alexander, 11 Paige, Ch. 619; Alexander *v.* Warrance, 17 Mo. 228; 1 Cruise, Dig. 402; Story, Eq. Jur. § 1204. But see Tibbetts *v.* Tilton, 11 Fost. (N. H.) 273; Eddy *v.* Baldwin, 23 Mo. 588; Guthrie *v.* Gardner, 19 Wend. 414; Rankin *v.* Harper, 23 Mo. 579, that the transaction is open to explanation. In Maine, a married woman may act as trustee. Springer *v.* Berry, 47 Me. 338. And in Texas it was held, that a trust might be created in favor of a husband by a conveyance to his wife. Smith *v.* Strahan, 16 Tex. 314. See also Sawyer's Appeal, 16 N. H. 460; *post*, p. *204.

[3] Lyford *v.* Thurston, 16 N. H. 406; Farrington *v.* Barr, 36 N. H. 89; Turner *v.* Eford, 5 Jones, Eq. 106; Philbrook *v.* Delano, 29 Me. 410; Brown *v.* Dwelley, 45 Me. 52; McLenan *v.* Sullivan, 13 Iowa, 521, 525; Chadwick *v.* Felt, 35 Penn. St. 305; Kelley *v.* Jenness, 50 Me. 464; Sunderland *v.* Sunderland, 19 Iowa, 328; McDonald *v.* McDonald, 24 Ind. 68; Perkins *v.* Nichols, 11 Allen, 545; Hutchins *v.* Heywood, 50 N. H. 491.

[4] Howell *v.* Howell, 15 N. J. Ch. 77; Millard *v.* Hathaway, 27 Cal. 139; Baumgartner *v.* Guessfeld, 38 Mo. 36.

of the purchaser himself and another person.[1] Where several joined in a purchase, giving their own notes for the purchase-money, though one signed as principal and the others as sureties, and the deed was taken to one, though intended for the benefit of all, it was held that a trust resulted in favor of all these purchasers. And where A furnished money to B with which to buy land to sell again, and to divide the profits between them, and B did so, taking the deed in the name of A, it was held, that A was trustee of B to the extent of his share of the profits, and would be answerable to B in a bill in equity; or B might sue him at law for his share of the profits.[2] If one make a voluntary deed to another, acknowledging consideration, or declaring a use therein, it is conclusive against any implied trust; but if there be a consideration actually paid by a third person, he would not be estopped by the recitals in the deed from showing the facts, and thereby raising a trust in his favor.[3] But merely signing a note as surety with a purchaser would raise no trust in the surety's favor, although he may have to pay the debt.[4] So where A bought land and paid for it, and had the deed made to B upon his agreement to repay the money at a future time, no trust was raised in favor of A. The intention of the parties to the transaction was, that B, and not A, should be the beneficial owner.[5] So where one made a voluntary deed without consideration, and in it declared the uses, it negatived the idea of a trust resulting to the grantor.[6] And in many of the States the law does not allow a trust to result in favor of

[1] Barron *v.* Barron, 24 Verm. 375; 2 Fonbl. Eq. 118; Wallace *v.* Duffield, 2 Serg. & R. 521; Ensley *v.* Balentine, 4 Humph. 233; 1 Spence, Eq. Jur. 511; 2 Flint, Real Prop. 811; Crop *v.* Norton, 2 Atk. 75; Baker *v.* Vining, 30 Me. 121; Willis, Trust. 60, 107; 1 Cruise, Dig. 391; Williams *v.* Hollingsworth, 1 Strobh. Eq. 103; Botsford *v.* Burr, 2 Johns. Ch. 405; Harper *v.* Phelps, 21 Conn. 257; McGowan *v.* McGowan, 14 Gray, 119; Sayre *v.* Townsend, 15 Wend. 647; Perry *v.* McHenry, 13 Ill. 227; Smith *v.* Strahan, 16 Tex. 314; White *v.* Carpenter, 2 Paige, 238; MacGregor *v.* Gardner, 14 Iowa, 343.

[2] Seymour *v.* Freer, 8 Wall. 216.

[3] Blodgett *v.* Hildreth, 103 Mass. 487; Hogan *v.* Jaques, 4 C. E. Green, 126; Botsford *v.* Burr, 2 Johns. Ch. 408; Linsley *v.* Sinclair, 24 Mich. 380; Jackson *v.* Cleaveland, 15 Mich. 102.

[4] Hopkinson *v.* Dumas, 42 N. H. 301; *post*, *175.

[5] McCue *v.* Gallagher, 23 Cal. 53.

[6] Jackson *v.* Cleveland, 15 Mich. 102.

one paying the purchase-money, if the deed is taken in another's name, if there is no fraud in the transaction.[1] And if A makes the purchase, and B pays a definite part or portion of the purchase-money, intending thereby to secure an interest in the land, a trust will result in that proportion in favor of B.[2] Of course, * in order to create a resulting trust by the payment of money, it must appear that the money belonged to the *cestui que trust*, or had been advanced to him as his own by way of loan.[3] A resulting trust, also, may arise, though there be only a bond given for the deed.[4] And where one, having no title to the same, conveyed an estate by quitclaim, with covenants for further assurance, and afterwards acquired a title to the same, it was held that he thereby became trustee for his grantee.[5] But where one of two joint-purchasers upon credit pays the whole debt, it does not raise a resulting trust in his favor.[6] In carrying out the doctrine above stated, it has been held, that the payment which raises a resulting trust must be part of the transaction, and relate to the time when the purchase was made. Any subsequent application or advance of the funds of another than the purchaser towards paying the purchase-money will not raise a resulting trust.[7] And while the fact from which the law raises the trust may be shown by the subsequent admissions of the supposed trustee, no subsequent agreement, if orally made, can create a trust.[8] Where an implied trust has been created from existing facts, a court of equity will enforce it by decreeing a conveyance of the estate.[9] [*175]

[1] *Post*, *213; Everett *v.* Everett, 48 N. Y. 218.

[2] Purdy *v.* Purdy, 3 Md. Ch. Dec. 547; Pierce *v.* Pierce, 7 B. Mon. 433; Shoemaker *v.* Smith, 11 Humph. 81; Franklin *v.* McEntyre, 23 Ill. 91; Hidden *v.* Jordan, 21 Cal. 92; Bayles *v.* Baxter, 22 Cal. 578; Green *v.* Drummond, 31 Md. 71.

[3] Getman *v.* Getman, 1 Barb. Ch. 499; Pegnes *v.* Pegnes, 5 Ired. Eq. 418; Oliver *v.* Dougherty, 3 Iowa, 371; Sullivan *v.* McLenans, 2 Iowa, 442.

[4] Williams *v.* Brown, 14 Ill. 200.

[5] Hope *v.* Stone, 10 Min. 141.

[6] Brooks *v.* Fowle, 14 N. H. 248.

[7] Alexander *v.* Tams, 13 Ill. 221; Perry *v.* McHenry, Id. 227; Buck *v.* Swazey, 35 Me. 41; Gee *v.* Gee, 2 Sneed, 395; Whiting *v.* Gould, 2 Wis. 552; Kelley *v.* Johnson, 28 Mo. 249; Howell *v.* Howell, 15 N. J. Ch. 78; Green *v.* Drummond, *sup.*

[8] Blodgett *v.* Hildreth, 103 Mass. 487; Hogan *v.* Jaques, 4 C. E. Green, 127

[9] Ripley *v.* Bates, 110 Mass. 162.

Thus if a surety pay the debt contracted for the purchase-money, for which he became surety at the time of the purchase, it raises no trust in his favor.[1] Nor will a trust be allowed to result so as to intervene and defeat prior or superior equities.[2] So where three bought and paid for land, and the deed was taken by two, with a parol agreement with the third that he should have wood from the same during life, no resulting trust arose in his favor, since the deed was according to the agreement of the parties.[3] And where A sold land to B upon a parol agreement to support A for life, and after his death to pay a sum of money, it was held not to raise a resulting trust in favor of A.[4] If an agent fraudulently purchase land for himself with his principal's money, he will be held as trustee therefor.[5] And it is stated generally, that, in order to create a resulting trust, there must either be a fraud in obtaining the title, or a payment of the purchase-money by the one in whose favor it is raised at the time when the title is acquired. No subsequent payment will raise such a trust.[6] A resulting trust must arise, if at all, at the time of the purchase, and not from any subsequent payment.[7] And where a husband borrowed money of his wife, which he invested in land, it was his money, and not hers, and no trust resulted in her favor. And even where he, having borrowed money of her, promised to invest it in real estate, and to take the title-deed to her, but bought land and took the deed to himself, it was held to raise no trust; for, if it was a trust at all, it was an express one, which could be raised only in writing.[8] This proposition may be illustrated by the two

[1] Gee *v.* Gee, 32 Miss. 190; *ante*, p. *174.

[2] McLenan *v.* Sullivan, 13 Iowa, 521, 525.

[3] Dow *v.* Jewell, 1 Fost. (N. H.) 470.

[4] Hunt *v.* Moore, 6 Cush. 1. The following cases sustain the general doctrine of resulting trusts in cases like those above stated: Tarpley *v.* Poage, 2 Tex. 139; Mahorner *v.* Harrison, 13 S. & M. 53; Smith *v.* Sackett, 5 Gilm. 534; Paul *v.* Chouteau, 14 Mo. 580; Long *v.* Steiger, 8 Tex. 460; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Rankin *v.* Harper, 23 Mo. 579.

[5] Wells *v.* Robinson, 13 Cal. 133; Green *v.* Clark, 31 Cal. 591.

[6] Barnet *v.* Dougherty, 32 Penn. St. 371; Kellum *v.* Smith, 33 Penn. St. 164; Walter *v.* Klock, 55 Ill. 362; Francestown *v.* Deering, 41 N. H. 443; Davis *v.* Wetherell, 11 Allen, 20, note.

[7] Brawner *v.* Staup, 21 Md. 337; Barnard *v.* Jewett, 97 Mass 87.

[8] Gibson *v.* Foote, 40 Miss. 792

following cases: In the one, A agreed to purchase for B an estate at auction. He bid it off, and paid for it out of his own money, and took a deed to himself, but refused to give B the benefit of it. It was held not to raise a trust in favor of B. He had resorted to no artifice, like declaring that he was bidding for B, whereby he acquired it for less than he would otherwise have had to pay. His fraud, if any, consisted in the subsequent refusal to do what he had agreed. In the other, the purchaser agreed to bid off the estate for the debtor at a sheriff 's sale, in order to save it from sacrifice, and so declared when he made the bid, and others thereby were induced not to bid; and it was held to be such a fraud as to raise a trust in favor of the debtor.[1] And the cases are numerous where bidders at auctions, who have become purchasers of estates, have either been held to be trustees for others, or required by courts of equity to convey the same to such other persons, on the ground that the purchase has been made at an inadequate price, by means of falsely representing that the purchaser was bidding for the other, who had some interest to save from sacrifice, as that he was mortgagor of the estate, or the like. It was held to be a fraud on the part of the purchaser.[2]

16. Parol evidence is competent to rebut the presumption of a resulting trust, provided it is not offered to contradict the terms of the instrument creating the estate.[3] Thus the declaration of the purchaser made at the time of the sale, and as a part of the *res gestæ*, is evidence bearing upon the question whether the payment then made raised a resulting trust or not.[4] And if the purchaser actually pay his own money,

[1] Kellum *v.* Smith, 33 Penn. St. 158; Trapnall *v.* Brown, 19 Ark. 48; Brown *v.* Dysinger, 1 Rawle, 408.

[2] Ryan *v.* Dox, 34 N. Y. 307, 315; Brown *v.* Lynch, 1 Paige, 147; Cox *v.* Cox, 5 Rich. Eq. 365; Keith *v.* Purvis, 4 Desaus. 114; Peebles *v.* Reading, 8 S. & R. 492.

[3] Strimpfler *v.* Roberts, 18 Penn. St. 283; 1 Spence, Eq. Jur. 511; 1 Cruise, Dig. 392; Jackson *v.* Feller, 2 Wend. 465; Botsford *v.* Burr, 2 Johns. Ch. 405; Livermore *v.* Aldrich, 5 Cush. 431; Adams *v.* Guerard, 29 Geo. 651; White *v.* Carpenter, 2 Paige, 238; Dow *v.* Jewell, 1 Foster, 489; Shepherd *v.* White, 11 Tex. 346; Hopkinson *v.* Dumas, 42 N. H. 303; Perkins *v.* Nichols, 11 Allen, 545.

[4] Edwards *v.* Edwards, 39 Penn. St. 378.

no oral declaration of an intent to raise a trust in favor of another will be of any effect.[1] And it has been held that this principle extends to cases of purchases made in the name of a child or a wife.[2]

[*176] *17. It is also competent to show by parol, even against the recitals in the deed, such facts as will raise a resulting trust in equity, such as the actual payment of the purchase-money by a person other than the one who takes the deed, as well as the actual ownership of the purchase-money.[3] But no one can set up a resulting trust unless he pay the money by which the purchase is made: he would not do it by showing the purchase was made for his benefit, or that there was a subsequent parol agreement by the one who receives the deed in respect to holding the land in trust.[4] And it must, moreover, be shown that the money was actually paid, directly or indirectly, by the one who claims to be *cestui que trust*. It would not be sufficient to show that he requested the one who made the purchase to do so, and promised to repay him what he paid for the same.[5] It is not necessary to show that the purchase-money was actually paid at the time of the conveyance made: it would be sufficient to show that it was paid in pursuance of the contract by which the purchase was made.[6] In Texas, as trusts can be created by

[1] Lloyd *v.* Lynch, 28 Penn. St. 419; *post*, p. *191; Roberts *v.* Ware, 40 Cal. 634.

[2] Finch *v.* Finch, 15 Ves. 43, a case of a purchase for a child. See Livingston *v.* Livingston, 2 Johns. Ch. 537, where the wife, having separate property, contracted in regard to it with her husband for a valuable consideration. Jackson *v.* Matsdorf, 11 Johns. 91.

[3] Livermore *v.* Aldrich, 5 Cush. 431; Coates *v.* Woodworth, 13 Ill. 654; Nichols *v.* Thornton, 16 Ill. 113; German *v.* Gabbald, 3 Binn. 302; Slaymaker *v.* St. John, 5 Watts, 27; Strimpfler *v.* Roberts, 18 Penn. St. 283; Lloyd *v.* Carter, 17 Penn. St. 216; Hollis *v.* Hayes, 1 Md. Ch. Dec. 479; Boyd *v.* M'Lean, 1 Johns. Ch. 582; Peabody *v.* Tarbell, 2 Cush. 226, 232; Story, Eq. Jur. § 1201 and note; Jackson *v.* Feller, 2 Wend. 465; Pritchard *v.* Brown, 4 N. H. 397; Drum *v.* Simpson, 6 Binn. 478; Neil *v.* Kesse, 5 Tex. 23; Reid *v.* Fitch, 11 Barb. 399; Bryant *v.* Hendricks, 5 Iowa, 256.

[4] Botsford *v.* Burr, *sup.*; Barnard *v.* Jewett, 97 Mass. 87; Green *v.* Drummond, 31 Md. 71; Dorsey *v.* Clark, 4 H. & John. 556; Roberts *v.* Ware, 40 Cal. 634; *post*, pl. 17.

[5] Kendall *v.* Mann, 11 Allen, 17; Perkins *v.* Nichols, 11 Allen, 546; Bayles *v.* Baxter, 22 Cal. 579.

[6] Blodgett *v.* Hildreth, 103 Mass. 487.

parol, they may be proved in the same way, and effect will be given to them accordingly.[1] Thus it has been held in Maine, that, if a deed absolute in its terms was intended only to secure a debt, a trust resulted in favor of the grantor, that, if he pay the debt within a reasonable time after due, the grantee should reconvey it, or account for the proceeds if he should have sold it.[2] So where A wished to purchase an estate, and borrowed the purchase-money of B, and had the deed made to B as security for the loan, it was held that a trust resulted to A, although the money passed immediately from the hands of B to the vendor, and the consideration was stated in the deed to have been paid by B.[3] But where a debtor, in order to secure his creditor, assigned a bond conditioned to convey land, under a verbal agreement to hold it as collateral security, and the debtor having failed to pay the debt, the assignee of the bond paid the purchase-money to the obligor, and took a deed of the land to himself, it was held not to raise a trust in favor of the debtor.[4] But where the person claiming the beneficial interest in land purchased in another's name has not actually paid any part of the purchase-money, it is not competent to raise a trust in his favor by showing, by parol, that the purchase was made by agreement for his benefit.[5] Nor is it competent to contradict by parol the acknowledgment, in a deed, of a consideration paid in order to raise thereby a resulting trust.[6] Nor can a resulting trust be proved by the parol declarations of the purchaser that he holds the land for another.[7] And it should be further stated, that in some of

[1] White *v.* Shepherd, 16 Tex. 173; Shepherd *v.* White, 11 Tex. 354.

[2] Richardson *v.* Woodbury, 43 Me. 208. But see Ratliff *v.* Ellis, 2 Iowa, 59; Hall *v.* Young, 37 N. H. 134.

[3] Millard *v.* Hathaway, 27 Cal. 140; Boyd *v.* McLean, 1 Johns. Ch. 591.

[4] Ramsdell *v.* Emery, 46 Me. 311.

[5] Botsford *v.* Burr, 2 Johns. Ch. 405; Bartlett *v.* Pickersgill, 4 East, 578, n.; Jackman *v.* Ringland, 4 W. & S. 149; Stephenson *v.* Thompson, 13 Ill. 186.

[6] Graves *v.* Graves, 9 Fost. 129; Philbrook *v.* Delano, 29 Me. 410.

[7] Sample *v.* Coulson, 9 W. & S. 62. But see Harder *v.* Harder, 2 Sandf. Ch. 17. But an act done, such as the payment of the consideration by another, may be proved by the admission of the one in whose name the purchase was made, for the purpose of raising a resulting trust. Lloyd *v.* Carter, 17 Penn. St. 216; Peebles *v.* Reading, 8 S. & R. 492; Irwin *v.* Ivers, 7 Ind. 308; *post*, p. *191.

the States the law will not admit of a trust resulting from the payment of the purchase-money, where the deed is taken in another's name, with the knowledge and consent of the person who paid the money. This, as will appear hereafter, is the law in New York. So, in Kentucky, no trust results in case of payment by one, and a deed made to another, unless the deed is so made without the consent of him who pays the money, or the purchaser shall have made the purchase with the effects of another person in violation of some trust.[1]

18. The term *constructive* trusts is sometimes used in a sense broad enough to embrace such as come properly under the head of *implied* or *resulting* trusts. But, properly speaking, constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds [*177] the legal title.[2] The * latter proposition may be illustrated by the case of a joint-mortgage to two, one of whom dies, and the survivor forecloses the same. The latter would be held as trustee of one-half of the estate for the heirs or representatives of the deceased co-mortgagee.[3] So a trust would be raised and could be shown by parol in favor of creditors, where the owner of land has conveyed it for the purpose of defeating or delaying creditors. The law requiring trusts to be declared in writing does not apply to secret trusts and confidences created for such purposes.[4]

19. This arises from the control which courts of chancery exercise over equitable estates, whereby, in case of fraud, mistake, or the like, they may require a grantee to hold subject to a trust in favor of the grantor in the nature of a resulting trust. But the mere want of a valuable consideration would not be sufficient to raise such a trust.[5]

[1] Graves *v.* Graves, 3 Met. (Ky.) 167; Hocker *v.* Gentry, Id. 463; *post*, p. *213; Martin *v.* Martin, 5 Bush, 47.

[2] 1 Spence, Eq. Jur. 511; Lewin, Trusts, 43, n. 170. "Such a trust is raised wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee."

[3] Randall *v.* Philips, 3 Mason, 378; Caines *v.* Grant, 5 Binn. 119; Laussat, Fonbl. Eq. 385, note; Buck *v.* Swazey, 35 Me. 41.

[4] Hills *v.* Eliot, 12 Mass. 31.

[5] Sand. Uses, 334; Wms. Real Prop. 136.

20. Among the cases of constructive trust is that of a trustee, who, availing himself of his power as such, purchases the trust-property for himself: a trust arises in such case in favor of the person for whom he was originally a trustee.[1] Thus where one, under a power of attorney to procure a soldier's patent for land, had it fraudulently made to himself, he was held to be a trustee for the soldier.[2] So where an administrator, by license of court, sold land of the intestate and purchased it in for himself, it was held, that, at the election of the heir, he would be held as trustee for him, or required to account for the purchase-money if the heir chose to affirm the sale.[3] The forms in which this doctrine has been raised and applied are exceedingly various, and the principle which runs through them may be said to be uniform in all the States. The law will not allow a man who stands in a fiduciary relation to an estate to become the owner of the same, directly or indirectly, through the exercise of the power or authority with which he has been intrusted in regard to the estate.[4] Nor does it make any difference that in acquiring the estate he may have paid a full price, or acted in good faith to his *cestui que trust*, or the parties interested in the estate.[5] No one, however, can impeach such a title but the *cestui que trust* or his heirs; for such purchase by a trustee is voidable only, and not void.[6] This may be ratified by the *cestui que trust*, if done with a full knowledge of the facts, and also of the law applicable to these facts.[7] But a forbearance on the part of the *cestui que trust* to disturb the purchaser's title, within a

[1] 1 Spence, Eq. Jur. 512; 2 Flint, Real Prop. 811; Jennison *v.* Hapgood, 7 Pick. 8.

[2] Smith *v.* Wright, 49 Ill. 409.

[3] Boyd *v.* Blankman, 29 Cal. 20, 35, 40.

[4] Collins *v.* Smith, 1 Head, 251, applied to a next friend of an infant; Jamison *v.* Glascock, 29 Mo. 191. See Downes *v.* Grazebrook, 3 Meriv. 200, as to purchase by solicitor of trustee; Hoffman, &c. Co. *v.* Cumberland, &c. Co., 16 Md. 507; Fairman *v.* Bavin, 29 Ill. 76; Gardner *v.* Ogden, 22 N. Y. 327, where the doctrine was extended to the clerk of the broker employed to sell land.

[5] Charles *v.* Dubose, 29 Ala. 367; Bellamy *v.* Bellamy, 6 Flor. 62; Hoffman, &c. Co. *v.* Cumberland, &c. Co., 16 Md. 508, extended to every one in a fiduciary character; Baldwin *v.* Allison, 4 Minn. 25; 1 White & Tud. Lead. Cas. 105.

[6] McNish *v.* Pope, 8 Rich. Eq. 112; Huff *v.* Earl, 3 Ind. 306; Baldwin *v.* Allison, 4 Minn. 25; Rice *v.* Cleghorn, 21 Ind. 80.

[7] Hoffman, &c. Co. *v.* Cumberland, &c. Co., *sup.*; Lewin, Trusts, 651.

reasonable time after notice of the facts, has sometimes been held to be equivalent to a ratification.[1] But while the proposition is all but universal, that a trustee who purchases or procures another to purchase trust-property at his own sale thereof holds it subject to the original trust,[2] he may, if acting *bona fide*, purchase the same of the *cestui que trust*, and thereby acquire a good title.[3] So if a trustee buy lands with trust-money in his own name, a trust will arise in favor of him for whom he held the trust-fund at his election, and parol evidence is competent to show the fact that the purchase was made with trust-money.[4] The right of the *cestui que trust* in such a case is to the land itself, and not merely to a lien upon it as security for the trust-money.[5]

21. So if one purchase from a trustee, with knowledge actual or constructive of the trust, he becomes himself the trustee of the property.[6] And the same rule applies to the sale of trust-property upon execution for the debt of the trustee: if the purchaser know the fact, he will be held to execute the trust.[7] But if the purchaser be ignorant of this, and pay a valuable consideration for the estate, he [*178] will hold it *discharged of the trust. It would be otherwise if he pay no consideration, as he would

[1] Jennison *v.* Hapgood, 7 Pick. 1, 8; Mitchell *v.* Berry, 1 Met. (Ky.) 602; Ives *v.* Ashley, 97 Mass. 204.

[2] Herr's Estate, 1 Grant's Cas. 272.

[3] Sallee *v.* Chandler, 26 Mo. 124; *Ex parte* Lacey, 6 Ves. 625; Downes *v* Grazebrook, 3 Meriv. 208, note; Richardson *v.* Spencer, 18 B. Mon. 450; *post*, p. *209.

[4] Deg *v.* Deg, 2 P. Wms. 412; Laussat, Fonbl. Eq. 119, note; Philips *v.* Crammond, 2 Wash. C. C. 441; Wallace *v.* Duffield, 2 S. & R. 521; Methodist Church *v.* Wood, 5 Ohio, 283; 1 Cruise, Dig. 393; Turner *v.* Pettigrew, 6 Humph. 438. And this extends to all cases where one purchases lands with another's money, and takes the deed to himself. There is in such case a trust in favor of the owner of the money. Foote *v.* Colvin, 3 Johns. 216; Brown *v.* Doe, 7 How. (Miss.) 181; Thomas *v.* Walker, 6 Humph. 93; Murdock *v.* Hughes, 7 S. & M. 219; Williams *v.* Turner, 7 Ga. 348; Lane *v.* Dighton, Ambl. 413; Prevost *v.* Gratz, 1 Peters, C. C. 364; Piatt *v.* Oliver, 2 M'Lean, 313; Pugh *v.* Pugh, 9 Ind. 132; Barker *v.* Barker, 14 Wis. 146.

[5] Wilkinson *v.* Wilkinson, 1 Head, 305; McCrory *v.* Foster, 1 Iowa, 276.

[6] Thompson *v.* Wheatley, 5 S. & M. 499; Pinson *v.* Ivey, 1 Yerg. 338; 1 Spence, Eq. Jur. 512; Saunders *v.* Dehew, 2 Vern. 271: 2 Flint, Real Prop. 770, 772, 787; Fearne, Cont. Rem. 325; Willis, Trust, 64; Stewart *v.* Chadwick, 8 Iowa 463.

[7] Fillman *v.* Divers, 31 Penn. St. 429.

have no equity to set up against the claim of the original *cestui que trust*.[1] And a morgagee without notice will hold as against a *cestui que trust*.[2] But this does not extend to the interest which a husband acquires in his wife's land upon marriage. He would not take the land which she held as trustee, discharged of trust, though he was ignorant of its existence when he married her. He would join with her as trustee, unless she were capable of acting as such by herself, as she may be in some of the States.[3] So if a creditor levy upon a trust-estate of which his debtor is trustee, he will not be permitted to hold the same as against the *cestui que trust*, although when he levied upon the land he was ignorant of the trust.[4] But if one, having notice of the trust, purchase of one who had no notice thereof when he bought the estate, he will hold it discharged of the trust in the same way as his vendor held it; and the same would be the rule if a purchaser without notice were to buy of one who had purchased of the trustee with notice of the trust.[5] But if an orignal purchaser with notice buys of one who had purchased the estate without notice, he will hold it subject to the original trust.[6]

22. It has already been stated, that by the statute of frauds no trust can be raised by a mere agreement as to the sale of lands, unless the same is in writing; yet if a purchaser has been prevented from having such agreement when made put into writing by the fraud of the vendor, or the contract has been carried partly into execution, equity will hold the vendor a trustee for the purchaser, and will not allow him to evade his agreement. To determine, however, what would be suf-

[1] 2 Flint, Real Prop. 770, 772; Co. Lit. 290 b, note 249, § 3; Searcy *v.* Reardon, 1 A. K. Marsh. 14; Paul *v.* Fulton, 25 Mo. 156; Lyford *v.* Thurston, 16 N. H. 408; Hopkinson *v.* Dumas, 42 N. H. 304.

[2] Newton *v.* McLean, 41 Barb. 285.

[3] Claussen *v.* La Franz, 1 Iowa, 236, 237; Hill, Trust. 287 and note; Palmer *v.* Oakley, 2 Doug. (Mich.) 433; *ante*, p. *174, note. See Perry on Trusts, §§ 48–51, as to when *femes covert* may be trustees.

[4] Shyrock *v.* Waggoner, 28 Penn. St. 430.

[5] Willis, Trust. 66; Laussat, Fonbl. Eq., 146, note; Bumpus *v.* Platner, 1 Johns. Ch. 213; Boone *v.* Chiles, 10 Pet. 177; Hoffman, &c. Co. *v.* Cumberland, &c. Co., 16 Md. 456.

[6] Church *v.* Church, 25 Penn. St. 278.

ficient part performance to take the case out of the statute of frauds, would open too wide a door for inquiry in this place.[1]

23. And if a grantee or devisee obtain a deed or devise by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter on the ground of fraud, and this may be proved by parol.[2]

24. Another class of trusts, which the statute of uses does not execute, has already been mentioned, and only needs to be referred to here; and these are trusts of terms for years. Thus where A, possessed of a term for years, limits it to B, to the use of C, it is not a use which the statute [*179] executes, for there is no * seisin to which to unite the use, and therefore B holds simply in trust for C, the interest being termed a trust instead of a use. And the remedy for the *cestui que trust*, like that of a *cestui que use*, must be sought in chancery.[3]

25. Trusts are sometimes divided into *executory* and *executed*. This is not in the sense that a use is executed when the seisin and uses are united in the *cestui que use*, but it is applied to the character of the trust itself, and assumes that there is a *cestui que trust* whose interest is equitable only, distinct from, and not to be united with, the legal estate. There will be found to be a singular discrepancy and want of definiteness in the use of these terms as applied to trusts by different writers upon the subject. Mr. Preston attempts to define the terms, but without much success.[4] Mr. Fearne gives an illustration by the citation of cases of the discrepancy arising in the application of the terms by different judges.[5] Gibson, C. J., commenting upon this disagreement, says there never was a time when there was not a substantial difference between an executory and executed trust, properly so called, and quotes with approbation the following definition given by Mr. Lewin; namely: "Trusts executed

[1] 2 Flint, Real Prop. 814; Sample *v.* Coulson, 9 W. & S. 62; Conner *v.* Lewis, 16 Me. 268.

[2] Hoge *v.* Hoge, 1 Watts, 163; Dowd *v.* Tucker, 23 Am. L. Reg. 477.

[3] 2 Flint, Real Prop. 630, 788; 1 Prest. Abst. 140.

[4] 1 Prest. Est. 186, 187.

[5] Fearne, Cont. Rem. 55, 113, 139.

are where the limitations of the equitable interest are complete and final: in the trust executory, the limitations of the equitable interest are not intended to be complete or final, but merely to serve as minutes and instructions for perfecting the settlement at some future period." [1] Ch. J. Kent, in explaining these terms, says: "A trust is *executory* where it is to be perfected at a future period by a conveyance or settlement, as in the case of a conveyance to B in trust to convey to C. It is *executed*, either when the legal estate passes as in a conveyance to B in trust for the use of C, or when only the equitable title passes, as in the case of a conveyance to B to the use of C in trust for D. The trust in the last case is executed in D, though *he has not the legal [*180] estate." [2] A single other citation from a judgment of the Chancellor of North Carolina will aid in forming a conclusion, while it serves to show that the idea of the two last writers is substantially correct, and may be adopted as being as near an intelligible definition as can be reasonably required: "An executory trust merely declares a general plan or outline to be carried out in detail according to the apparent intention of the creator of the trust. Executed is a final and complete declaration by the person raising the trust of what it is, and leaving nothing for the trustee to do to define and settle it." [3] Lord St. Leonards thus distinguishes between the two: "All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But that is not the sense in which a court of equity considers an *executory trust*, as distinguished from a trust executing itself." [4] And Ames, C. J., in commenting on the above remarks, says: "A trust for B in fee, and a trust to convey to B in fee, cannot be substantially distinguished. Both are quite distinct from a direction to trustees to make such a settlement of an estate as would best insure the continuance of the estate in him and

[1] Dennison *v.* Goehring, 7 Penn. St. 175; Lewin, Trusts, 45.

[2] 4 Kent, Com. 304, 305.

[3] Saunders *v.* Edwards, 2 Jones (N. C.), Eq. 134. See Willis, Trusts, 29; 1 Cruise, Dig. 403; Porter *v.* Doby, 2 Rich. Eq. 49; Tud. Lead. Cas. 503; Evans *v.* King, 3 Jones, Eq. 387.

[4] Egerton *v.* Brownlow, 4 H. L. Cas. 210.

his children. In the former case the limitations are perfect; in the latter they are yet to be made. In the former the trusts are said to be *executed*, in the sense of being definite, or completely marked out; in the latter case *executory*, since no mode of settlement is prescribed, but merely the intent or purpose of the creator of the trust to be carried out by a settlement to be made by the trustee.[1]

26. Out of these several elements, namely, uses upon uses, active trusts, which require the trustee to retain the seisin of the estate, constructive trusts, and such as are raised by implication, and trust terms, which are incapable of being executed or united with the equitable interest in the *cestui que use* or trust, and to form one legal estate, the system of modern trusts has been built up by courts of equity, by continuing to exercise jurisdiction over them in the same manner as they had exercised it over uses generally before the statutes of 27 Hen. VIII. The doctrine of uses was revived under the name of trusts, with this distinction: As equity had to shape and frame the system with reference to the then existing state of things, the courts gave it more the form of the law of real property, as generally understood, than had previously obtained as to uses, and assimilated trusts to legal estates more nearly than had ever been done in respect to uses.[2]

27. There was the same double character in the system of legal and equitable interests as when uses were in full vigor, the *legal* estate being in one called the trustee, the *equitable* interest or estate being in another called the *cestui que trust.*

[*181] The estate of the trustee, being a legal one, derives its character and * qualities from the common law, and is the only estate known to or recognized by the courts of law.[3] Little, therefore, need be added, when speaking of the estate of a trustee, to what has heretofore been said of estates at law. It may be created or conveyed, as an estate of inheritance or any less estate, in severalty or in joint-tenancy,

[1] Tillinghast *v.* Coggeshall, 7 R. I. 393; Neves *v.* Scott, 9 How. 211; Hill, Trustees, 328.

[2] 2 Flint, Real Prop. 631; Burgess *v.* Wheate, 1 W. Bl. 180; 1 Spence, Eq. Jur. 501.

[3] Wms. Real Prop. 135; Hill, Trust. 274 and note.

in possession or remainder, and descends as any other legal estate.[1] A trustee may convey his legal estate himself, or by attorney.[2] So he may devise it by general words in his will,[3] though such an estate is not subject to execution for the debt of the trustee,[4] nor can he incumber it even for the payment of the purchase-money.[5]

28. The interest of the *cestui que trust* is generally called a *trust*, and derives its character and qualities from rules adopted by courts of equity. But these were conformed, as nearly as could be, to the rules of the common law which govern legal estates.[6] Thus, it is said, "the equitable estate is the estate at law in a court of equity, and is governed by the same rules in general as all real property is, by imitation. The equitable estate in this court is the same as the land, and the trustee is considered as a mere instrument of conveyance."[7] And "that trusts and legal estates are governed by the same rules, is a maxim which has obtained universally."[8] It has accordingly been held, that, "in construing limitations of trusts, courts of equity adopt the rules of law applicable to the legal estate." "Declarations of trust are construed in the same manner as common-law conveyances, where the estate is finally limited by deed."[9]

29. A trust estate, therefore, is considered in equity as equivalent to the legal ownership, governed in general by the same rules and liable to every charge in equity, formerly with the exception of dower, and to every consequence except escheat, to which the other is subject at law.[10] The *cestui que trust* is seised absolutely of the freehold in the con-

[1] 2 Flint, Real Prop. 770; Co. Lit. 290 b, note 249, § 14.

[2] Telford *v.* Barney, 1 Iowa, 575.

[3] Jackson *v.* DeLancy, 13 Johns. 555; Braybroke *v.* Inskip, 8 Ves. 417.

[4] Bostick *v.* Keizer, 4 J. J. Marsh. 597; Williams *v.* Fullerton, 20 Vt. 346.

[5] Wilhelm *v.* Folmer, 6 Penn. St. 296.

[6] Wms. Real Prop. 136; Co. Lit. 290 b, note 249, § 14; Willis, Trust. 107.

[7] Cholmondeley *v.* Clinton, 2 Jac. & W. 148.

[8] Banks *v.* Sutton, 2 P. Wms. 713, by Jekyll. See 2 Flint, Real Prop. 631; 2 Spence, Eq. Jur. 875; Sand. Uses, 269.

[9] Price *v.* Sisson, 13 N. J. 174, 179; Glenorchy *v.* Bosville, Cas. temp. Talbot, 3, 19.

[10] 2 Flint, Real Prop. 631; 1 Prest. Est. 189; 1 Prest. Abst. 136; Willis, Trust. 25, 26, 105; Wms. Real Prop. 135; 1 Spence, Eq. Jur. 497.

[*182] sideration of the * court of equity. The trust is the land. The declaration of the trust is the disposition of the land.[1] Thus a trust in favor of A for life, or of him and the heirs of his body, or of him and his heirs, gives him the same equitable estate that these words would give had they been applied to the legal estate.[2] And an estate in freehold, in trust, gives the *cestui que trust* a settlement in Massachusetts under the provisions in respect to "estates of freehold."[3] The *cestui que trust*, in such cases, is the beneficial owner of the property; and though the trustee may receive the rents and profits thereof, the *cestui que trust* has a right to call him to account for, and compel him to hand over, the whole proceeds to him. This right, however, is subservient to the general purposes of the trust, and to its preservation in favor of all the objects of the trust.[4]

30. There is a principle of the common law in force in England, and several of the United States, called the rule in Shelley's case, whereby if an estate is given to one for life, and then to his heirs or the heirs of his body, or with a remainder to such heirs, it is construed to be an estate in fee-simple or fee-tail in him, and the heirs, if they take at all, take by descent, and not by purchase. And this rule applies alike to equitable as to legal estates, in case of executed trusts.[5] But it does not apply in respect to executory trusts, especially trusts in marriage settlements, nor in any case where it is intended that the tenant for life shall not have a right to cut off the estate in remainder.[6]

31. The equitable estates spoken of in this chapter follow the rules of legal estates as to their descent,[7] and may be

[1] Burgess *v.* Wheate, 1 Eden, 223; Co. Lit. 290 b, note 249, § 12; Croxhall *v.* Shererd, 5 Wall. 281.

[2] Wms. Real Prop. 136; Sand. Uses, 269; Co. Lit. 290 b, note 249, § 14; 1 Prest. Abst. 144.

[3] Orleans *v.* Chatham, 2 Pick. 29.

[4] Wms. Real Prop. 135; 1 Spence, Eq. Jur. 497; Sand. Uses, 267.

[5] Wms. Real Prop. 136; Tud. Lead. Cas. 503; 1 Spence, Eq. Jur. 503. See *post*, c. iv.; Tillinghast *v.* Coggeshall, 7 R. I. 383; Croxhall *v.* Shererd, 5 Wall. U. S. 281.

[6] Berry *v.* Williamson, 11 B. Mon. 245; Tud. Lead. Cas. 504; Gill *v.* Logan, 11 B. Mon. 231.

[7] Wms. Real Prop. 139; 1 Spence, Eq. Jur. 502; 2 Flint, Real Prop. 631; Co. Lit. 290 b, note 249, § 14; Bush's Appeal, 33 Penn. St. 88.

devised in the same manner as legal estates,[1] and if it be an estate-tail, it can be barred in the same manner as legal estates.[2]

* 32. In England, equitable estates are made sub- [*183] ject to the debts of the *cestui que trust* by force of statutes to that effect, though not originally so liable.[3] But the bankruptcy or insolvency of a trustee does not, either there or in this country, affect the legal estate in his hands.[4] The interest of a bankrupt trustee does not pass to his assignee under the law of the United States.[5]

33. The laws of the several States, as to the liability of trust estates for the debts of *cestuis que trust*, are not uniform. In New York, Wisconsin, and New Hampshire, such an estate has been held liable.[6] So it has been in Connecticut, where the trust is a naked one, and the trustee has no discretionary power over the estate.[7] In Pennsylvania, one may convey or devise property so as not to be liable for the debts of the *cestui que trust;*[8] though the general law of that State makes all estates in land, and interests in all kinds of property, whether held in a legal or an equitable form, subject to legal execution for debts.[9] In New Jersey, a trust estate is not the subject of levy for debt.[10]

34. Trusts, as a general proposition, conform to the rules of law applicable to legal estates, in respect to their duration, their dissolution, and their transmission.[11]

35. Springing, shifting, and future trusts of every kind, of

[1] 2 Flint, Real Prop. 781; Newhall *v.* Wheeler, 7 Mass. 189.

[2] Croxhall *v.* Shererd, 5 Wall. 281.

[3] Willis, Trust. 115, 116; 1 Prest. Est. 144; Wms. Real Prop. 140; 2 Flint, Real Prop. 631, 771.

[4] Wms. Real Prop. 141; Hill, Trust. 530; Blin *v.* Pierce, 20 Vt. 25; Hynson *v.* Burton, 5 Ark. 492; Ontario Bank *v.* Mumford, 2 Barb. Ch. 616; Kip *v.* Bank of New York, 10 Johns. 63; Kennedy *v.* Strong, Id. 289; Clarke *v.* Minot, 4 Met. 346.

[5] Faxon *v.* Folvey, 110 Mass. 395.

[6] Foote *v.* Colvin, 3 Johns. 216; Jackson *v.* Walker, 4 Wend. 462; Lyford *v.* Thurston, 16 N. H. 408; Wis. Rev. Stat. c. 134, § 37; Hutchins *v.* Heywood, 50 N. H. 491.

[7] Johnson *v.* Conn. Bank, 21 Conn. 159.

[8] Norris *v.* Johnston, 5 Penn. St. 287; Vaux *v.* Parke, 7 W. & S. 19.

[9] Bush's Appeal, 33 Penn. St. 85. [10] Hogan *v.* Jaques, 4 C. E. Green, 123.

[11] 1 Spence, Eq. Jur. 501; 1 Prest. Abst. 644; Co. Lit. 290 b, n. 249, § 14.

the nature of springing and shifting uses, hereafter to be considered, are allowed. But the same rule against perpetuities applies as to trusts which is applied to legal estates. To be valid, they must be so limited as to be sure to vest in a *cestui que trust*, if at all, within the period of a life or lives in being, and twenty-one years and a fraction after.[1]

36. Another instance where chancery adopts the [*184] rules of law * in respect to trust is in the matter of limitations, although the English statute 21 Jac. I. c. 16, did not in terms apply to express trusts. The subject is now regulated by the statute 3 and 4 Wm. IV. c. 27. But many questions have arisen in this country, as well as in England, in which the doctrine of the statute of limitations has been applied to trusts, in cases where there has been what answers to an adverse enjoyment.[2]

37. From the nature of the relation between the trustee and *cestui que trust* of an express trust, no length of mere possession or occupation by the trustee can operate as a bar to the claim or the rights of the *cestui que trust* in respect to the estate.[3] "Where there is no disclaimer, the statute of limitations has no application to express trusts."[4] Trusts which can be enforced only in a court of equity, where the question is between the trustee and *cestui que trust*, do not come within the statute of limitations. But where the remedy is at law, the statute applies.[5] If a trustee sell lands held in trust, it amounts to a repudiation of the trust, and the possession of the purchaser is thereafter adverse to the *cestui que trust*.[6]

[1] 1 Spence, Eq. Jur. 500, 503; 1 Prest. Abst. 145; Co. Lit. 290 b, note 249, § 14. In New York, the term of perpetuity is fixed at two lives in being at the creation of the trust. Boynton *v.* Hoyt, 1 Denio, 53.

[2] 1 Spence, Eq. Jur. 502, 503; Lewin, Trusts, 2d ed. 614; Hill, Trust. 264 and note; Cholmondeley *v.* Clinton, 2 Jac. & W. 143; Phalen *v.* Clark, 19 Conn. 421; Kane *v.* Bloodgood, 7 Johns. Ch. 123; Roberts *v.* Roberts, 7 Bush, 100.

[3] Hill, Trust. 264 and note; Lewin, Trusts, 2d ed. 613; Gardner *v.* Gardner, 6 Paige, Ch. 455; Foscue *v.* Foscue, 2 Ired. Eq. 321; Kane *v.* Bloodgood, 7 Johns. Ch. 123; Johnston *v.* Humphreys, 14 S. & R. 394; Murdock *v.* Hughes, 7 S. & M. 219; Starke *v.* Starke, 3 Rich. 445; Boone *v.* Chiles, 10 Pet. 223; Fishwick *v.* Sewell, 4 Harr. & J. 393; McDonald *v.* Sims, 3 Ga. 383; Shibla *v.* Ely, 2 Halst. Ch. 181; Cunningham *v.* McKindley, 22 Ind. 151; Dow *v.* Jewell, 18 N. H. 358; *post*, *501.

[4] Seymour *v.* Freer, 8 Wall. 218.

[5] Governor *v.* Woodworth, 63 Ill. 258.

[6] Peters *v.* Jones, 35 Iowa, 512.

38. But this principle does not apply to cases of constructive trusts, where, by the wrongful act of one party, the other may charge him in equity as his trustee. The rule in respect to this class of trusts is, that if one, knowing he could avail himself of the benefit of such a trust, lies by for twenty years, his claim will thereby be barred.[1] But the statute will in no case run against one innocently ignorant of his rights, nor against one incompetent, like an infant, to enforce them.[2]

39. It has accordingly been held, that, after twenty years' adverse possession by a trustee, the claim of a *cestui que trust* will be barred, if he has not been under a disability and no *fraud has been practised. Thus, where the [*185] trustee has refused to account for rents and profits, or has denied the *cestui que trust's* title to the estate, his possession from the time of such denial will be deemed to have been adverse, and the statute will begin to run.[3] So the claim of the *cestui que trust* may be barred, if the trustee suffers his legal rights to be lost and barred by neglecting to assert them against an adverse possession within the period of limitation.[4]

40. There are a few exceptions, however, to the proposition, that equity adopts the same rules in relation to equitable estates which courts of law do in respect to legal estates. And these arise partly from the nature of these estates, partly from the desire of courts of equity to carry into effect the

[1] Lewin, Trusts, 2d ed. 611; Hill, Trust. 265; Murdock *v.* Hughes, 7 S. & M. 219; Kane *v.* Bloodgood, 7 Johns. Ch. 120; Boone *v.* Chiles, 10 Pet. 223; Willison *v.* Watkins, 3 Pet. 43, 52; South Sea Co. *v.* Wymondsell, 3 P. Wms. 143. And the same principle applies in the case of resulting trusts. They cannot be enforced after twenty years. Strimpfler *v.* Roberts, 18 Penn. St. 283; Brawner *v.* Staup, 21 Md. 337.

[2] Starke *v.* Starke, 3 Rich. 447; 3 Brown, Ch. 646, Perkins' note for American cases; Kane *v.* Bloodgood, 7 Johns. Ch. 123; Willison *v.* Watkins, 3 Pet. 43, 52; Phalen *v.* Clark, 19 Conn. 421; Sherwood *v.* Sutton, 5 Mason, 143.

[3] 2 Flint, Real Prop. 772; Oliver *v.* Piatt, 3 How. 411; Hunter *v.* Marlboro, 2 Woodb. & M. 168; Doe *v.* Prosser, Cowp. 217; Willison *v.* Watkins, 3 Pet. 43, 52; Selby *v.* Alston, 3 Ves. 342, Sumner's note; Bohannon *v.* Sthreshley, 2 B. Mon. 438; Murdock *v.* Hughes, 7 S. & M. 219; Williams *v.* First Presb. Soc., 1 Ohio St. 478. See Cunningham *v.* McKindley, 22 Ind. 151; Roberts *v.* Roberts, 7 Bush, 100.

[4] Bryan *v.* Weems, 29 Ala. 423.

intention of the parties who create such estates, and in one instance from a desire to conform to a state of things which had become fixed before the institution of trusts. Among these exceptions, one is, that such estates are not the subjects of *tenure*, as understood by the common law,[1] nor of seisin or disseisin, as these terms are ordinarily applied.[2] Nor can they be conveyed by any mode which operates by force of the statute of uses.[3]

41. As a consequence, there is no escheat of such estates; and if all the heirs of a *cestui que trust* fail, the entire estate becomes absolute in the trustee.[4]

42. But while, in respect to the legal estate of the trustee; the doctrines of the common law as to seisin and possession of lands apply,[5] in courts of equity the actual receipt of rents and profits under the equitable title answers to a seisin of premises at law; and this right may, like a seisin, be lost by a long adverse enjoyment.[6]

[*186] *43. Another exception is, that the word "heirs" is not always necessary in order to give an equitable estate the character of inheritability, if it requires that such an effect should be given in order to carry out the clear intention of the party creating it. Thus it is said, if land be given to a man without the word "heirs," and a trust be declared of that estate, and it can be satisfied in no other way but by the *cestui que trust* taking an inheritance, it has been construed that a fee passes to him even without the word "heirs."[7] It is accordingly now a settled rule of law, that, where there is a devise to trustees "if the purposes of the trust cannot by possibility be satisfied without a fee, courts of law will so construe it," wherever there is a devise to trustees.[8] Where,

[1] 1 Spence, Eq. Jur. 500. [2] 2 Flint, Real Prop. 771; 1 Prest. Abst. 148.

[3] Co. Lit. 290 b, note 249, § 14.

[4] 1 Spence, Eq. Jur. 500; Wms. Real Prop. 138; 1 Prest. Abst. 147; Lewin, Trusts, 2d ed. 290; Burgess *v.* Wheate, 1 W. Bl. 123. In Maryland, trust lands escheat if the *cestui que trust* dies without heirs. Matthews *v.* Ward, 10 Gill & J. 443.

[5] 1 Spence, Eq. Jur. 502.

[6] Lewin, Trusts, 2d ed. 514; Cholmondeley *v.* Clinton, 2 Jac. & W. 152.

[7] Villiers *v.* Villiers, 2 Atk. 71; Fisher *v.* Fields, 10 Johns. 505; Oates *v.* Cooke, 3 Burr. 1684; Gould *v.* Lamb, 11 Met. 87.

[8] Welch *v.* Allen, 21 Wend. 147; Trent *v.* Hanning, 7 East, 97; Lewin,

therefore, there was a devise, to a religious society, of an estate which was to be kept in the possession and under the management of trustees named, who were to receive the rents for the use of the society, it was held to clothe the trustees with a fee, so far as the legal estate was concerned, the society being the *cestuis que trust*, because, "whenever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied."[1] And upon that ground, a trust to sell lands, upon a prescribed contingency, confers a fee-simple upon the trustee to enable him to execute the trust.[2] Upon a similar principle, a limitation of an estate to one and the heirs of his body may, notwithstanding the rule in Shelley's case, be construed to be an estate for life in the first taker, with a separate and independent estate-tail to the children as purchasers. And this applies especially in marriage settlements, because, if held to be an ordinary estate-tail in the parent to whom the estate for life is first limited, he might, by barring the entail, deprive the children of the benefit of the estate.[3]

44. On the other hand, trustees will not in general be held to take any larger estate than the nature of the trust requires, where the trust is to last for a certain time only, even though in terms it be limited to the trustee and his heirs.[4] Every trustee, therefore, is presumed to take an estate as large as may * be necessary for the purposes of his [*187] trust, and no larger, although the limitation be to him and his heirs, or be to him without any words of inheritance.[5]

Trusts, 2d ed. 234; Shaw *v.* Weigh, 2 Stra. 803; Fletch. Trust. 49; Gibson *v* Montfort, 1 Ves. Sen. 485; Gibson *v.* Rogers, Ambl. 93, 95; Villiers *v.* Villiers, 2 Atk. 71; Newhall *v.* Wheeler, 7 Mass. 189; Oates *v.* Cooke, 3 Burr. 1686, per Wilmot, J.; Attorney-Gen. *v.* Prop. Meeting-house, &c., 3 Gray, 48; Cleveland *v.* Hallett, 6 Cush. 406; Doe *v.* Considine, 6 Wall. 471; 2 Jarm. Wills, 156.

[1] Stanley *v.* Colt, 5 Wall. U. S. 168.

[2] Lewin, Trusts, 2d ed. 235; Loveacres *v.* Blight, Cowp. 356; Neilson *v.* Lagow, 12 How. 98; Angell *v.* Rosenbury, 12 Mich. 266.

[3] Wms. Real Prop. 137; Sand. Uses, 311; *post*, c. iv.

[4] Fletch. Trust. 49; Doe *v.* Barthrop, 5 Taunt. 382; 1 Cruise, Dig. 388; Doe *v.* Davies, 1 Q. B. 438; Liptrot *v.* Holmes, 1 Ga. 381; Doe *v.* Considine, 6 Wall. 471.

[5] Norton *v.* Norton, 2 Sandf. 296; Ward *v.* Amory, 1 Curtis, C. C. 419; Coulter *v.* Robertson, 24 Miss. 278; Ellis *v.* Fisher, 3 Sneed, 231; Shaw *v.* Weigh, 2 Stra. 803; Barker *v.* Greenwood, 4 M. & W. 421; Adams *v.* Adams, 6 Q. B.

The trustee will take a fee if the trust is of such a nature that it does or may require an estate in the trustee beyond the term of his own life.[1] Thus it was held in one case, that the trustee took a fee determinable upon the arriving of a person at the age of twenty-one, where the devise was in trust till the youngest son of the devisor arrived at that age, and the devisees named were then to come into possession of the estate.[2] So a devise to A and B, in trust for a parish, gives the trustees named a fee, though no words of inheritance are used.[3] Accordingly, where land is devised to trustees, to sell and apply the proceeds without any limitation as to the continuation of the trust, the title will remain in the trustees till the sale, unless they are sooner removed by the court.[4] But where an estate was conveyed in trust to pay debts, and, after the payment of such debts, in trust to A B, it was held, that A B had an immediate estate in trust in the surplus.[5]

45. But, after all, these are merely rules of construction; and, if a less estate than a fee is expressly given, courts cannot enlarge it by construction, even though it would be inadequate to effect the trusts, if not considered as a fee.[6] But where the conveyance was to A and *his successors* in office, in trust for a religious society, A took only a life-estate. Nor could it be an executed use in the society, so as to hold it after his death, because it could only be executed during his life, there being no limitation to his heirs.[7] So if there are no words which give the trustees an estate beyond the time within which the trust is to be executed, the estate of the trustee determines when that period expires. But if the estate limited

860; Doe *v.* Nicholls, 1 B. & C. 336; Doe *v.* Ewart, 7 A. & E. 636; Morton *v.* Barrett, 22 Me. 257; Smith *v.* Metcalf, 1 Head, 64; Wells *v.* Heath, 10 Gray, 25; Attorney-General *v.* Proprietors, &c., 3 Gray, 48; Cleveland *v.* Hallett, 6 Cush. 407; Renziehausen *v.* Keyser, 48 Penn. St. 351.

[1] Cleveland *v.* Hallett, 6 Cush. 403; Farquharson *v.* Eichelberger, 15 Md. 73; Wilcox *v.* Wheeler, 47 N. H. 490.

[2] Pearce *v.* Savage, 45 Me. 90; Deering *v.* Adams, 37 Me. 264.

[3] Wells *v.* Heath, 10 Gray, 25; Attorney-General *v.* Proprietors, &c., 3 Gray, 48.

[4] Cumberland *v.* Graves, 9 Barb. 595.

[5] 1 Cruise, Dig. 369; Doe *v.* Timins, 1 B. & Ald. 547.

[6] Warter *v.* Hutchinson, 1 B. & C. 721; Evans *v.* King, 3 Jones, Eq. 387.

[7] Baptist Society *v.* Hazen, 100 Mass. 322.

be a fee, though the trust may be performed in a limited period of time, the estate in the trustee will not determine when the trust has been executed, if no particular time is fixed at which the trust shall cease, as where the limitation is to A B and his heirs to raise £1,000.[1] Accordingly, where a trustee is appointed *to hold the estate of a married [*188] woman, to protect it from the husband, and the marriage relation comes to an end, his estate at once becomes executed in the person who is to take it, the wife if living, or, if she is dead, her heirs at law.[2] Where, therefore, a trust was created in favor of a *feme sole*, in contemplation of her marriage then about to take place, it determined upon her becoming discovert, and did not revive upon her marrying again.[3]

46. Upon the principles above stated, as soon as a vendor signs an agreement of sale with a purchaser, if the vendor has a good title of inheritance, it is held in equity that the purchaser has an immediate estate in fee-simple. Unless a smaller estate is expressly bargained for, it is understood to be a conveyance of whatever estate the vendor has, and that a fee may thereby pass without the word "heirs."[4]

47. Under some circumstances, equity, discarding the technical rules of law which discriminate between real and personal property, treats money as real estate imbued with the character and incidents of real estate, by considering that as done and actually existing which ought to be done.[5] Thus a *cestui que trust* may follow the trust-fund into land purchased

[1] Doe *v.* Nicholls, 1 B. & C. 341; Doe *v.* Edlin, 4 A. & E. 582; Doe *v.* Ewart, 7 A. & E. 636. In Doe *v.* Davies, 1 Q. B. 437, Patteson, J., says: "If the devise be for purposes which are to last only for a certain time, the use of the word "heirs" will not give a fee; the devise will be cut down to the time necessary for the purposes. But if a fee be given in terms, with trusts which, by their nature, extend over an indefinite time, it is not so; if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down." Selden *v.* Vermilya, 3 Comst. 525; Comby *v.* McMichael, 19 Ala. 747; Steacy *v.* Rice, 27 Penn. St. 75.

[2] Liptrot *v.* Holmes, 1 Ga. 381; Bush's Appeal, 33 Penn. St. 85; Steacy *v.* Rice, 27 Penn. St. 75; Morgan *v.* Moore, 3 Gray, 323.

[3] Wells *v.* McCall, 64 Penn. St. 207, 214.

[4] Bower *v.* Cooper, 2 Hare, 408; Wms. Real Prop. 137.

[5] Brothers *v.* Porter, 6 B. Mon. 106; Lewin, Trusts, 2d ed. 668.

with it by his trustee.[1] So if lands are directed to be sold and the money laid out in purchasing other lands, to be settled in a particular manner, equity will regard those who are entitled to the estate as already in possession of the estates which they are to have. And the same will be true, from whatever source the money is derived, if received with a direction to be laid out in land,[2] the grantee or devisee who has accepted the engagement becoming a trustee of the equitable interest of the persons entitled to the produce of the sale.[3] Money accordingly agreed or directed to be laid out in land is, for this purpose, considered as real estate in descending to heirs, instead of going to executors, in being subject to curtesy, and in passing by a devise of lands and hereditaments.[4]

[*189] And if a purchaser of an estate die before the *deed is delivered, the equitable estate will descend to his heir, who may compel the application of the personal estate of the deceased in payment of the purchase-money.[5]

48. Another difference between the rules regulating legal estates and trusts applies to contingent remainders. By the common law, if the particular estate by which such a remainder is supported is destroyed by the act of the tenant before the remainder becomes vested, the remainder is itself destroyed. But no such consequence will follow, in respect to a contingent remainder of the equitable ownership, by any act proceeding from the tenant of a prior particular estate of the same equitable ownership.[6] And a reason for this is, that trusts reject all the rules founded on the principles of tenure, by which there must always be a seisin of the estate; and if that of the tenant of the freehold fails before the remainderman is ready to take it, it reverts to another; so that, to adopt the illustration of a writer, "if an estate be conveyed unto and to the use of B, in trust for B for life, and, after his death, upon a trust in favor of the children of C, the trust for the children does not fail by the death of B before the birth of a

[1] Wms. Real Prop. 137; 1 Prest. Est. 185.

[2] 2 Flint, Real Prop. 800.

[3] Sand. Uses, 298.

[4] 2 Flint, Real Prop. 801; Sand. Uses, 300; Lewin, Trusts, 2d ed. 668; Houghton *v.* Hapgood, 13 Pick. 154, 158.

[5] Wms. Real Prop. 138.

[6] 1 Prest. Abst. 146.

child of C (as it would have done if limited by the way of use),[1] but it subsists for the benefit of after-born children. In short, the equitable effect of the trust is commensurate with the legal effect of an executory use (as distinguished from a contingent remainder), both equally rejecting the strict rules of the common law."[2]

49. Another marked difference between estates at law and in equity consisted in the distinction made between the right of widows to dower in trust estates and that of husbands to curtesy. Equity gave husbands of *cestuis que trust* in fee a right to curtesy in their estates, and it is said that the courts * were inclined to apply a similar rule to the [*190] dower of widows. But so many of the estates in the kingdom had been conveyed to uses for the very purpose of preventing claims to dower, that it was found it would produce great confusion, if, under the statute of uses, they were to hold a different rule as to trusts from that previously applied to uses. It was accordingly held, as an imperative rule of law, that widows were not entitled to dower out of equitable estates until the late statute of 3 and 4 Wm. IV. c. 105, which altered the law in this respect.[3] It was, however, held to be a fraud in the husband secretly to convey his estate to a trustee for his own benefit, just before his marriage, in order to defeat the claim of his wife to dower.[4]

[1] *Ante*, pp. *115, *118, *140.

[2] 1 Spence, Eq. Jur. 505; Fearne, Cont. Rem. 304, 305; *ante*, p. *120. See Scott *v.* Scarborough, 1 Beav. 168. Though to understand the application of the above propositions assumes the knowledge of the doctrine of remainders, it seemed necessary to anticipate what will be explained hereafter when treating of remainders in their order.

[3] 1 Spence, Eq. Jur. 801; Co. Lit. 290 b, note 249, § 14; D'Arcy *v.* Blake, 2 Sch. & L. 288; Burgess *v.* Wheate, 1 W. Bl. 182.

[4] 1 Cruise, Dig. 411. See also Brewer *v.* Connell, 11 Humph. 500. In Vermont, the grantee in such a case would be held a trustee for the wife. Jenny *v.* Jenny, 24 Vt. 324. But such conveyance would not be impeached at law. Baker *v.* Chase, 6 Hill, 482.

SECTION III.

HOW CREATED, DECLARED, AND TRANSFERRED.

1. Prior to statute of frauds, might be done by parol.
2. What required as proof by statute of frauds.
3. Statute provides for creating and for transferring trusts.
4. What writing is sufficient to declare a trust.
5. What form of instrument sufficient to transfer it.
6. Declaration may be before or after conveyance to trustee.
7. Instances of sufficient declarations of a trust.
8. Of trusts raised by precatory words in a will.
9. Not necessary to convey legal estate to create a trust.
10. Trusts may be conveyed by a simple declaration.
11. Trust, when created, only extinguished by union with legal estate.
12. No one but owner of legal estate can declare a trust.
13. Trust, if accepted, may be discharged, how.
14. Effect of refusal to accept a trust.
15. Of survivorship of trust in several trustees.
16. Of trust surviving in case of personal confidence.
17. Distinction between a power and trust, in surviving.
18. Equity never wants for a trustee.
19. When a trustee takes the estate of the old one.
20, 21. When necessary for old trustee to convey to the new.
22. New trustee stands in place of the old.
23. How far trustee can invalidate a trust.
24. Effect upon a trust of devise by trustee.
25. Effect of conveyance of trust-estate by trustee.
26. Of conveyances by trustees to preserve remainders.
27. Effect of union of legal and equitable estates.
28. When husband held trustee for wife.
29. When a union of legal and equitable estates causes no merger.
30. Equity only enforces trusts through the person of trustee.
31. Of trust terms.

1. After this inquiry into the extent to which the rules in relation to the nature, duration, qualities, and incidents of legal estates are applied by courts of equity to trusts, it seems proper to inquire how trusts may be created, declared, and transferred. It has already been shown, that, whenever a conveyance of land was made with an intent to secure the benefits of it to a third person, equity enforced this intent through the conscience of him who took the legal estate. Nor did it matter how this intention was expressed or de-

clared. A parol declaration, therefore, of such intention, was equally valid with one however solemnly made ; and this was true of alterations of uses already created.[1] Such continued to be the law as to trusts, when they had taken the place of ancient uses, until the statute of frauds, * 29 [*191] Car. II. c. 3.[2] And such is still the law in North Carolina and Texas, which have never adopted the statute of frauds.[3]

2. By the seventh section of that statute, all *declarations* or *creations* of trusts, &c., of any lands, tenements, or hereditaments, must be *manifested* and *proved* by some writing, signed by the party creating the trust, or by his last will in writing. The eighth section excepts from the effect of that statute trusts which arise or result by the *implication* or *construction* of *law ;*[4] while the ninth section requires all grants or assignments of any trusts, &c., to be made in writing, signed by the party, &c., or by his last will or devise.[5] Thus, proof of an oral admission or declaration by one holding a deed of land, that he holds it in trust, is not competent evidence to establish it.[6] Nor would a declaration of a father, made at the time of purchase, that he bought the land for his son, be sufficient to create a trust.[7] There are cases, however, where a party has, for a sufficient consideration, bound his estate so far in equity in favor of another, that, if he part with it to a third party, equity will hold the latter as a trustee in favor of the one who was entitled to it by such agreement. Thus a contract to make mutual wills between two persons, and one has executed it and died, the court will decree a specific performance by the other party ; and the court has made the estate of the party who did not comply with the agreement liable to the other party who had complied, on the happening of the event which entitled him to the benefit. And it is said

[1] Willis, Trust. 40, 41. [2] 1 Spence, Eq. Jur. 497.

[3] Foy *v.* Foy, 2 Heyw. 296 ; Miller *v.* Thatcher, 9 Tex. 482; Millican *v.* Millican, 24 Tex. 440.

[4] Peabody *v.* Tarbell, 2 Cush. 226 ; Strimpfler *v.* Roberts, 18 Penn. St. 283.

[5] Wms. Real Prop. 139.

[6] Moore *v.* Moore, 38 N. H. 382 ; Sturtevant *v.* Sturtevant, 20 N. Y. 39; Horn *v.* Kettletas, 46 N. Y. 610.

[7] Lloyd *v.* Lynch, 28 Penn. St. 419.

by a writer in 4 Am. Law Rev. 661: "There can be no doubt that a person in his lifetime may so bind himself to others as substantially to make himself trustee of the property which he is bound to devise in a certain manner for their benefit; and this may be by parol, provided that such persons, during the lifetime of the testator, have performed certain acts relying upon the faith of his promise to devise his property in a certain manner. Should the testator violate his promise, and bequeath his property in another way, and to other persons, equity will treat such other persons as trustees of those to whom his property should have been, by the former promise, conveyed."[1] And it is said that parol evidence is not competent to change the character of an absolute deed into one in trust, unless fraud, accident, or mistake, be clearly alleged in respect to it, and proved.[2] Beyond the citations below, it is not deemed necessary to add any thing in this connection to what has already been said of implied, resulting, or constructive trusts, as they are excepted from, and not affected by, the statute of frauds;[3] unless it be, that whether a resulting trust has been discharged or not is the subject of parol proof.[4]

3. The statute contemplates two classes of cases; namely, the creation of new trusts, and the transfer of trusts already created and in existence. All that it requires as to either of these classes is a writing signed by the party creating or transferring the trust, or the doing this by his last will. And although it is usual to adopt the same forms of conveyance by deed in the matter of trusts as in the case of legal estates, such formality is not necessary.[5]

4. It is not even necessary that the declaration should be made to the *cestui que trust*.[6] And if made in his favor,

[1] He cites Loffus *v.* Maw, 32 L. J. N. S. Eq. 49; reported also 3 Gifford, 592; Ridley *v.* Ridley, 12 L. Times, N. S. 481. See also Wright *v.* Tinsley, 30 Mo. 389, 397; Rivers *v.* Rivers, 3 Desaus. Eq. 194.

[2] Ratliff *v.* Ellis, 2 Iowa, 59; Hall *v.* Young, 37 N. H. 134. See *ante*, p. *176; Bartlett *v.* Bartlett, 14 Gray, 278; Blodgett *v.* Hildreth, 103 Mass. 486.

[3] 1 Spence, Eq. Jur. 497, 512; 1 Cruise, Dig. 391.

[4] Hopkinson *v.* Dumas, 42 N. H. 303; Farrington *v.* Barr, 36 N. H. 86.

[5] 1 Spence, Eq. Jur. 506; Wms. Real Prop. 140; Willis, Trust. 47; Sand. Uses, 342; Co. Lit. 290 b, note 249, § 14.

[6] Barrell *v.* Joy, 16 Mass. 221; Browne, Stat. Frauds, § 99.

though unknown to him, he may claim and enforce it, if he do so within a reasonable time.[1] Nor is it necessary that what is * written should be intended as a declara- [*192] tion or evidence of the trust, since the object of requiring a writing is not thereby to *declare* or *create* a trust, but to furnish the requisite and only competent *evidence* of an existing fact; namely, that there is a trust and confidence in the trustee in respect to the estate, in favor of another, and which, but for the statute, might be otherwise proved.[2] The evidence, however, should show, not only that there is this trust, but what the trust is.[3] No particular form of words or expression is required to create a trust, provided the language used clearly indicates, on the part of the trustee, that the land is held by him in trust, or if the papers by which he holds it indicate the same.[4] And in interpreting the words in which a trust is declared, courts adopt the same rules as in granting the legal estate. Thus a trust in favor of A, with no words of inheritance, would be for life only.[5]

5. The same rule applies as to what is necessary in form, in conveying or transferring an existing trust by a *cestui que trust*, as in creating it at first. The writing by which it is done should express the intention of the assignor to convey, with proper formal words of limitation, or words indicating the quantity of estate it is intended the *cestui que trust* should take. "The benefit of a trust of what kind soever, whether vested or not, and though it should confer an inter-

[1] Ward *v.* Lewis, 4 Pick. 521–523; Berly *v.* Taylor, 5 Hill, 577; Shepherd *v.* M'Evers, 4 Johns. Ch. 136; Crocker *v.* Higgins, 7 Conn. 342; Scull *v.* Reeves, 2 Green, Ch. 84; Bryant *v.* Russell, 23 Pick. 508, 520; Hill, Trust. 52, Wharton's note for American cases.

[2] Forster *v.* Hale, 3 Ves. 707; Steere *v.* Steere, 5 Johns. Ch. 1; Lewin, Trusts, 30; 1 Cruise, Dig. 390; Unitarian Soc. *v.* Woodbury, 14 Me. 281; Brown *v.* Brown, 1 Strobh. Eq. 363; 1 Spence, Eq. Jur. 497; Movan *v.* Hays, 1 Johns. Ch. 339, 342; Trapnall *v.* Brown, 19 Ark. 48; 1 Greenl. Ev. § 266; Brown *v.* Combs, 5 Dutch. 36, 39.

[3] Forster *v.* Hale, 3 Ves. 707; Lewin, Trusts, 31; Steere *v.* Steere, 5 Johns. Ch. 1.

[4] Norman *v.* Burnett, 25 Miss. 183; Forster *v.* Hale, 3 Ves. 707; Scituate *v.* Hanover, 16 Pick. 222; Ames *v.* Ashley, 4 Pick. 71; Gomez *v.* Tradesmen's Bank, 4 Sandf. 102; 1 Spence, Eq. Jur. 497; White *v.* Fitzgerald, 19 Wis. 480, 485.

[5] Evans *v.* King, 3 Jones, Eq. 387.

est equivalent to an estate of freehold, may be transferred by any form of instrument, or rather by any instrument, however destitute of form, which expresses the intention, provided it be in writing, and signed by the party bound, or by his agent lawfully authorized."[1] But the evidence of such creation or transfer must all be in writing, without the necessity of resorting to parol evidence to connect the writings by which this is sought to be shown.[2] In applying these rules, it has [*193] been held, that where the deed was * to "A, as he is trustee of B," it would be competent to refer to a will by which A is created a trustee of B, though this was not referred to in the deed.[3] So where a trust was created in favor of "the rightful owners" of a certain estate, they were permitted to show, *aliunde*, who these owners were, so as to establish the trust.[4] Letters from one holding real estate, addressed to A and B, in which he speaks of the estate in such a manner as to show an acknowledgment on his part that A and B and others are interested in it, might be sufficient evidence of an existing trust in favor of these persons.[5]

6. The time when the declaration of the trust is made, if done in writing, may be either before or after the conveyance to the trustee has been made.[6]

7. What will be held a sufficient declaration of a trust, and in what form it may be made, can only be shown by illustrations drawn from decided cases. Among these are the following: A bond conditioned to convey an estate to such person as the obligee should appoint, given by one in whose name the estate had been purchased, was held to be sufficient to create a trust in favor of the obligee.[7] So an indenture of three parts, reciting that A held the estate in trust for B, and had conveyed to C by B's request, was held sufficient to

[1] 1 Spence, Eq. Jur. 506; Wright *v.* Wright, 1 Ves. Sen. 409; 2 Flint, Real Prop. 779; Brydges *v.* Brydges, 3 Ves. 120; 2 Prest. Conv. 368.

[2] Abeel *v.* Radcliff, 13 Johns. 297; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Chadwick *v.* Perkins, 3 Me. 399; Walker *v.* Locke, 5 Cush. 90.

[3] Cleveland *v.* Hallett, 6 Cush. 403. [4] Ready *v.* Kearsley, 14 Mich. 226.

[5] Pratt *v.* Ayer, 3 Chandl. 265; Forster *v.* Hale, 3 Ves. 707, and cases cited in note; Sumner's ed. 696 and 713. See Montague *v.* Hayes, 10 Gray, 609.

[6] Barrell *v.* Joy, 16 Mass. 221–223; Jackson *v.* Moore, 6 Cow. 706.

[7] Moorecroft *v.* Dowding, 2 P. Wms. 314; Orleans *v.* Chatham, 2 Pick. 29

declare C a trustee.[1] So an indorsement upon a soldier's discharge, of a certificate that A B was entitled to whatever lands such soldier might have a claim to for his service, was held to be sufficient to raise a trust in favor of A B against the soldier to whom a patent for the land subsequently issued; A B having, at the date of the indorsement, bought the soldier's right, and paid an agreed price for it.[2] So an indorsement upon an envelope, containing a deed signed by the grantee, "Deeds, &c., property held by me in trust for B, wife, &c., to be conveyed to B when he desires it," was held to be a sufficient declaration of a trust.[3] In the case of Barrell *v.* Joy, cited above, the admission of the
*trust which it was sought to charge upon the de- [*194]
fendant was contained in a printed pamphlet which was published by him in relation to the estate.[4] And another piece of evidence held competent in the same case was the language of an indenture about the land between the defendant and a stranger.[5] But merely calling a deed in the recital of other deeds a deed of trust does not render it so.[6] An acknowledgment, however, of a trust in an answer to a bill in equity, is sufficient evidence of a declaration of such a trust.[7] If a testator direct his lands to be sold to pay debts, &c., or charge his realty with these or with legacies, the heir or devisee who takes the legal estate will hold the same as a trustee, and this will be held to be a good declaration of a trust.[8]

8. Sometimes a testator produces the same effect by precatory or recommendatory words in his will, unless he clearly leaves the devisee to choose whether to follow these or not at his election. As where his language was "desire," "will," "entreat," "order or direct," "recommend," "hope," "no doubt," and the like, it has been held sufficient to raise a trust, where the objects intended to be benefited,

[1] Wright *v.* Douglass, 3 Seld. 564.

[2] Fisher *v.* Fields, 10 Johns. 495. [3] Raybold *v.* Raybold, 20 Penn. St. 308.

[4] Barrell *v.* Joy, 16 Mass. 221.

[5] Ibid. See also Hutchinson *v.* Tindall, 2 Green, Ch. 357; Browne, Stat. Frauds, §§ 98, 99; Willis, Trust. 47.

[6] Hurst *v.* M'Neil, 1 Wash. C. C. 70.

[7] Barron *v.* Barron, 24 Vt. 375; Pratt *v.* Ayer, 3 Chandl. 265.

[8] Lewin, Trusts, 77.

and the property to be applied, are clearly indicated.[1] Mere precatory words of desire or recommendation will not, in general, convert the devise into a trust, unless it appears affirmatively that they were intended to be imperative.[2] But there must be certainty as to the parties who are to take, and as to what they are to take. The words "will" and "desire" are not necessarily mandatory. If designed to be peremptory, they become imperative, though *precatory* in form. A devise to A for life of real and personal estate, with a remainder to a grandson, with a "will" and "desire," that, if the grandson come of age, he should have "a portion of the estate as a loan," was held not to create a trust in favor of the grandson during A's life.[3] And generally, where one gives property by will, and points out the object of the gift, the property and the way it shall go, a trust is created, unless the will expressly leave the property subject to the control of the trustee.[4]

9. It is not necessary that the creation of a trust should be accompanied by, or connected with, any transfer or change in the legal estate, or made simultaneously therewith. [*195] As if, for *instance, the owner of real estate were to declare himself, in writing, trustee of another in respect to the same, the beneficial interest in the property would pass to the *cestui que trust* named, without any further act being necessary to effect it.[5] Where a trustee, being debtor to the trust, in order to secure it made a deed of his land to himself as trustee, which was duly executed except the record, and left it among his papers, it was held a good declaration of trust, and bound his estate accordingly.[6] And where a deed was made "to a school-house and the congre-

[1] Erickson *v.* Willard, 1 N. H. 217; Jarm. Wills, 334; Lewin, Trusts, 77; Story, Eq. Jur. § 1068; Harrison *v.* Harrison, 2 Gratt. 1; Willis, Trust. 48; Harper *v.* Phelps, 21 Conn. 257; Sand. Uses, 317. See this principle limited and explained at length by Lowrie, J., in the case of Pennock's Estate, 20 Penn. St. 274–280; Warner *v.* Bates, 98 Mass. 277; 4 Am. L. Rev. 617–624.

[2] Burt *v.* Herron, 66 Penn. St. 402.

[3] Lines *v.* Darden, 5 Flor. 51.

[4] Inglis *v.* Trustees S. S. Harbor, 3 Pet. 119.

[5] 1 Spence, Eq. Jur. 507; Suarez *v.* Pumpelly, 2 Sandf. Ch. 336; Morrison *v.* Beirer, 2 Watts & S. 81.

[6] Carson *v.* Phelps, 23 Am. L. Reg. 103.

gation thereof," though it would pass no legal estate, because, for one reason, no person competent to take is named as grantee, yet it was held to be a good declaration of trust, leaving the title to vest where it was before. "No form of words is necessary to constitute such a declaration, it being sufficient that an intention to create a trust is clear."[1]

10. The same doctrine applies to the case of a *cestui que trust* transferring the trust from himself to another. It will be sufficient for him to declare that his trustee shal be the trustee of the other person to whom he wishes to make over the trust, especially if such other person gives the trustee notice of the transfer.[2]

11. It may be remarked, that, where a trust has once been created in respect to real estate, it attaches to and binds itself upon the estate, and can never be detached from it, nor extinguished, except by a union of the legal and equitable estates in one person; the equitable, in such case, being merged in the legal estate.[3]

12. Upon the question who may make a declaration, or create a trust which shall thus attach to an estate, it may be stated in the first place, that it must be one who has the legal estate in the same. His act is the source or origin of the two estates which flow on afterwards, independent of each other in point of ownership, until they merge by being again united in one person.[4]

13. No one is obliged to become a trustee by the appointment of another. To constitute one such, he must accept the trust by words or by some interference * with [*196] the estate which is put in trust.[5] But a trustee, when he has accepted the trust, cannot surrender it or discharge himself of it without the consent of the *cestui que trust* or direction of the court, unless there is a power to that effect given in the instrument creating the trust.[6] Where a gift

[1] Morrison *v.* Beirer, 2 Watts & S. 81.

[2] 1 Spence, Eq. Jur. 507.

[3] 1 Spence, Eq. Jur. 501; 1 Cruise, Dig. 403; Sand. Uses, 35; *post*, pl. 27.

[4] Willis, Trust. 55; Crop *v.* Norton, 2 Atk. 76.

[5] Willis, Trust. 38, 72; Baldwin *v.* Porter, 12 Conn. 473; Lewis *v.* Baird, 3 McLean, 58; Scull *v.* Reeves, 2 Green, Ch. 84; Goss *v.* Singleton, 2 Head, 67; Story, Eq. § 1061.

[6] Shepherd *v.* M'Evers, 4 Johns. Ch. 136; Lewin, Trusts, 457; Cruger *v*

is made by deed, will, or otherwise, the law presumes it to be, *prima facie*, beneficial to the donee, and that it is accepted by the donee, unless the contrary is shown. And this seems to apply both to the trustee and *cestui que trust*.[1]

14. If the person named as trustee refuses the trust, it is treated precisely as if he were dead, or had never been named; and if he be one of several named, the estate vests in such of them as do accept the trust.[2] The refusal here meant is something more than a mere oral declaration made at any time: there must be some actual disclaimer of the trust on the part of the party named, or he may, at any time, assume the trust.[3] But where one named as trustee in a will forbore, for twenty years, to accept or do any thing under the appointment, it was held that he had renounced the trust, and refused to accept it.[4] It may be by deed, by matter of record, or any written evidence, or by answer in chancery. And such refusal or disclaimer will relate back, and will be held to have been made at the time of the gift.[5] And if the trustee should decline or refuse to act at all, the court may appoint other trustees, if necessary, to carry the trust into effect.[6]

15. Whether the power and interest of a trustee survive when given to several, and one or more of them dies, depends upon the nature of the trust and the form of the power delegated. If the authority be committed to trustees, the presumption is, that, as the power was coupled with an interest,

Halliday, 11 Paige, Ch. 319; Drane *v.* Gunter, 19 Ala. 731; Gilchrist *v.* Stevenson, 9 Barb. 9; Lalor, Real Est. 195.

[1] Hill, Trustees, 214; Goss *v.* Singleton, 2 Head, 77, and note to p. 68; Cloud *v.* Calhoun, 10 Rich. Eq. 358.

[2] Hill, Trust. 225; King *v.* Donnelly, 5 Paige, Ch. 46; unless it be a devise to trustees, and they all decline the trust. Trask *v.* Donoghue, 1 Aik. 373; Putnam Free School *v.* Fisher, 30 Me. 526. A devise to executors, *eo nomine*, in trust, vests in such of them as execute the will, and their survivors, though it be a trust to sell lands. Leavens *v.* Butler, 8 Port. 394; Scull *v.* Reeves, 2 Green, Ch. 94, 95; Co. Lit. 113 a; Lewin, Trusts, 428; Jones *v.* Maffet, 5 Serg. & R. 523; Burrill *v.* Sheil, 2 Barb. 457; Conover *v.* Hoffman, 1 Bosw. 214; Hill, Trust. 225; Goss *v.* Singleton, *sup.*, p. 68, note; Saunders *v.* Harris, 1 Head, 185, 206.

[3] Judson *v.* Gibbons, 5 Wend. 224; McCosker *v.* Brady, 1 Barb. Ch. 329; Tainter *v.* Clarke, 13 Met. 220, 227; Lewin, Trusts, 428.

[4] Matter of Robinson, 37 N. Y. 263.

[5] Hill, Trust. 224; Goss *v.* Singleton, 2 Head, 67.

[6] Story, Eq. § 1061; White *v.* Hampton, 13 Iowa, 259.

it was meant to survive.[1] Lord Coke states the law upon this subject thus: "If a man deviseth lands to his executors to be sold, and maketh two executors, and one dieth, yet the survivor may sell the land because as the state (estate), so the trust shall survive, and so note the diversity between a bare trust and a trust coupled with an interest."[2]

16. This subject of survivorship comes more properly under the head of Powers, which will be found in a subsequent part *of this work; and therefore it is only [*197] necessary now to say in general terms, that, if a power be a joint one coupled with an interest, it will survive if one of the donees of the power die. But where it is a mere naked authority it will not survive. So if the authority be to two or more in an official capacity, *ratione officii*, it will survive if either die. But if it be to them *nominatim*, or they are clothed with a special confidence of a personal nature, it will not survive. The subject is much considered in the case cited below,[3] in which the distinction suggested by Coke, in the passage above cited, is adopted and acted upon: namely, if the trust be to several by name, they must all join in executing it; if to several executors as executors or trustees, *ratione officii*, as "my trustees," "my sons," and the like, without naming them, the authority will survive so long as the plural number of such trustees, executors, and the like, remain.[4] And the same rule, it would seem, applies where one or more of the trustees, instead of dying, decline to act as such.[5] Though in New York, if one of several trustees is suffered to resign, the others cannot go on and act as if he were dead: a new trustee must be appointed in his place.[6] It often, therefore, furnishes a ready clew by which to determine whether a trust in two or more persons survives upon the death of one of them or not, to examine whether it is of the nature of a personal confidence or not; for if the act to be

[1] Lewin, Trusts, 428; Story, Eq. Jur. § 1062; Peter *v.* Beverly, 10 Pet. 564.

[2] Co. Lit. 113 a.

[3] Tainter *v.* Clark, 13 Met. 225.

[4] Hill, Trust. 473; Co. Lit. 113 a, note 146. See American cases collected in Hill, Trust. 472, Wharton's note; 1 Sugd. Pow. ed. 1856, p. 146; Peter *v.* Beverly, 10 Pet. 565; Zebach *v.* Smith, 3 Binn. 69; Conover *v.* Hoffman, 1 Bosw. 214; Jackson *v.* Given, 16 Johns. 167; Story, Eq. Jur. § 1062.

[5] Co. Lit. 113 a.

[6] Van Wyck's Petition, 1 Barb. Ch. 570.

done requires an exercise of the judgment and discretion of the several persons named as trustees, it can only be exercised by them all.[1]

17. And the rule to be gathered from what is above said may be again stated, that where there are several joint-trustees, and one of them dies, the survivors take and are authorized to act by virtue of their survivorship, in the same [*198] way as one of *two joint-tenants of a legal estate takes by survivorship, unless it is a power only, and one not coupled with an interest; because, as an almost invariable rule, two or more trustees hold as joint-tenants, and not as tenants in common. If it is such a power, it ceases with the death of either of the trustees.[2] A power is considered as coupled with an interest where the trustees have a right to the possession of the legal estate, or have a right in the subject over which the power is to be executed.[3]

18. It is a rule of universal application, that, where there is a trust, a court of equity never wants for a trustee.[4] Thus, where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking it shall be deemed a trustee for other trusts in the will, or for those who are to take under the disposition of law.[5] And if, therefore, the one who creates the trust fails to appoint a trustee, equity follows the legal estate, and decrees that he in whom it vests shall perform the trust.[6] If a grant be to one as trustee, and to his successor, he cannot himself appoint

[1] Hill, Trust. 226.

[2] Stewart *v.* Pettus, 10 Mo. 755; *ante*, p. *170; Peter *v.* Beverly, 10 Pet. 564. "I devise that my executors shall sell" is a mere power. "I devise to my executors to sell" gives an interest in the land. Mosby *v.* Mosby, 9 Gratt. 590. See also Jackson *v.* Schauber, 7 Cow. 194; Bergen *v.* Bennett, 1 Caines, Cas. 15, 16; Story, Eq. Jur. § 1062.

[3] Gray *v.* Lynch, 8 Gill, 403; Mosby *v.* Mosby, 9 Gratt. 584–594; Bloomer *v.* Waldron, 3 Hill, 365.

[4] McGirr *v.* Aaron, 1 Penn. 49; Harris *v.* Rucker, 13 B. Mon. 564; Story, Eq. Jur. § 1059; 1 Cruise, Dig. 403, 460; 1 Spence, Eq. Jur. 501; 2 Id. 876; Co. Lit. 290 b, note 249, § 4; Wilson *v.* Towle, 36 N. H. 129; Hill, Trust. 49; Cloud *v.* Calhoun, 10 Rich. Eq. 358; Miller *v.* Chittenden, 2 Iowa, 315, 370, 376; White *v.* Hampton, 10 Iowa, 244, s. c. 13 Iowa, 261; White *v.* Hampton, 13 Iowa, 259; Mills *v.* Haines, 3 Head, 335.

[5] Drew *v.* Wakefield, 54 Me. 297.

[6] Co. Lit. 290 b, note 249, § 4; Stone *v.* Griffin, 3 Vt. 400.

such successor. Upon his ceasing to be trustee, this duty and power devolve upon the court.[1] But a court cannot appoint a new trustee merely because the existing one fails to do his duty. The course in such a case is to compel him to perform it.[2] And if the trust is created by a will in which an executor is named, but no trustee, the executor is ordinarily deemed to be the trustee by implication.[3] Whether, therefore, the trustee named be dead, or is an improper or incapable person, or refuses to act, the trust devolves upon the court, whose duty it is to supply a trustee.[4] A trust may be valid and effectual where a trustee is named, although the *cestui que trust* may not then be *in esse*, provided such *cestui que trust* subsequently come into being. Thus a devise to trustees in behalf of a church or society not yet formed or organized will be effectual, if such church or society be formed within a reasonable time.[5] And there has been a somewhat anomalous class of trusts wherein this doctrine has been carried to a still farther extent. In the early organization of the towns of Massachusetts and New Hampshire, they partook of both a municipal and parochial character, and funds and estates were occasionally given them for parochial purposes, such as support of the ministry, &c. It was held, that, in these cases, the towns as civil corporations were the trustees of the parishes coexisting with them, and that, when the parish became a distinct corporation from the town, it took the character of a trustee as successor of the town, as to such funds or estate, unless the creation of the trust expressly made the municipal corporation the trustee to hold the estate for the parish. The subject is fully discussed, and this change of trustees by successorship explained and sustained, by the court of New Hampshire, and in a learned note by Judge Redfield.[6] The trustees named in such a devise retain the

[1] Wilson *v.* Towle, 36 N. H. 129. [2] Tainter *v.* Clark, 5 Allen, 66.

[3] Nash *v.* Cutler, 19 Pick. 67; Hall *v.* Cushing, 9 Pick. 395; Saunderson *v.* Stearns, 6 Mass. 37; Dorr *v.* Wainwright, 12 Pick. 328.

[4] Burrill *v.* Shiel, 2 Barb. 457; 1 Spence, Eq. Jur. 501; 1 Cruise, Dig. 460; Gibbs *v.* Marsh, 2 Met. 243.

[5] Miller *v.* Chittenden, 2 Iowa, 372, 376; *ante*, p. *115.

[6] Newmarket *v.* Smart, 13 Am. Law Reg. 390, and note, p. 402. See also Medford *v.* Medford, 21 Pick. 202; Shrewsbury *v.* Smith, 14 Pick. 297.

legal estate so long as they live; nor could the society convey the same, or elect new trustees to hold the property, although the usages of such society be to have their property held and managed by trustees of their own election.[1] The court may appoint a new trustee as a substitute for or in addition to an existing one, or may appoint one where there is none, or may discharge an existing trustee upon his own application.[2] This applies also where a trustee becomes a lunatic, or [*199] *leaves the country, or dies without heirs, or leaves only an infant heir.[3] Thus it was held in Massachusetts, that the supreme court had the authority to allow a trustee to resign his trust, as incident to the general equity jurisdiction of the court,[4] notwithstanding the statute gives an authority upon the same subject. And in this respect the law in England and this country substantially coincides, since the subject of appointing one trustee upon the resignation of another is regulated by legislation, as well as conferred by the general rules of law which limit and define the powers of courts of equity.[5]

19. By the late English statutes, and in this the statutes of several of the United States concur, where a new trustee has been appointed by the court in the place of a former one, it operates to pass to him the legal estate which had been in the former trustee, without any further act of conveyance or release on the part of the latter.[6] But this applies only to

[1] Peabody *v.* Eastern Methodist Society, 5 Allen, 540.

[2] Wms. Real Prop. 143; Hill, Trust. 190, 191, Wharton's note for American cases; Lewin, Trusts, 592, 593. In New York, this may be done by the Supreme Court. Lalor, Real Est. 194, 196. In Massachusetts, it may be either by the Supreme Court, or Court of Probate. Gen. Stat. c. 100.

[3] Wms. Real Prop. 143; Suarez *v.* Pumpelly, 2 Sandf. Ch. 337.

[4] Bowditch *v.* Banuelos, 1 Gray, 220.

[5] Wms. Real Prop. 143; Stat. 13 and 14 Vict. c. 60, 15 and 16 Vict. c. 55; 4 Kent, Com. 311, note; Mass. Gen. Stat. c. 100, § 8; The People *v.* Norton, 5 Seld. 176; Hill, Trust. 190. But see Van Wyck's Petition, 1 Barb. Ch. 565.

[6] Wms. Real Prop. 143; Stat. 15 and 16 Vict. c. 55, § 1; Mass. Gen. Stat. c. 100, § 9; Parker *v.* Converse, 5 Gray, 336, 341. So in South Carolina, McNish *v.* Guerard, 4 Strobh. Eq. 66. For American statutes, as well as cases, upon the appointment of new trustees, the reader is referred to Hill on Trustees, Whart. ed. 190, 191, notes; Lalor, Real Est. 194, 195.

such trustees as are appointed under and by virtue of the statute, and not those created by deed.[1]

20. It should, however, be borne in mind, that at common law, upon the death of a trustee, his estate descended charged with the trust to his heirs. And upon his removal, and the appointment of a new one, it was necessary that a conveyance should be made in form from him to the new trustee, in order to pass the estate. All that the court of equity could do, in making such a transfer, was to compel the holder of the legal estate to execute proper conveyance thereof.[2]

21. It is therefore to be assumed, that in all cases, except * where special provision is made to the con- [*200] trary by statute, the interest and estate of a trustee can only be divested by a conveyance thereof, even though he be removed from his trust, and another appointed by the court in his place. To complete the appointment of such new trustee, the court directs and requires the one in whose place he is appointed to execute a proper conveyance of the legal estate to the new trustee.[3] And the abandonment of a trust by one of two trustees does not vest his title in the remaining trustee.[4]

22. When a trustee has been appointed in the place of another, and a proper conveyance has been executed to the new trustee of the estate held in trust, he ordinarily becomes as completely substituted thereby in the place of the other, and with as full powers, as if he had been invested originally with the trust.[5] The exception to this is, where the original trustee had been vested with a special power indicating personal confidence, which in some cases the new trustee may not execute.[6]

[1] Webster Bank *v.* Eldridge, 115 Mass. 424.

[2] Lalor, Real Est. 194, 195; Berrien *v.* McLane, Hoffm. Ch. 420; Van Wyck's Petition, 1 Barb. Ch. 570. In New York, trust estates do not descend upon the death of the trustee: the trust vests in the court. Lalor, Real Est. 193. The law is the same as to the descent of trust estates in Michigan and Wisconsin as in New York. Hill, Trust. 303, note.

[3] Hill, Trust. 186, 196; O'Keefe *v.* Calthorpe, 1 Atk. 17; Lewin, Trusts, 594; *Ex parte* Greenhouse, 1 Madd. 109; Lee, Abst. 252; 1 Cruise, Dig. 460.

[4] Webster *v.* Vandeventer, 6 Gray, 428.

[5] Hill, Trust. 211; Cole *v.* Wade, 16 Ves. 44

[6] Lewin, Trusts, 596; Hill, Trust. 211; Doyley *v.* Attorney-General, 2 Eq. Cas. Abr. 195; Hibbard *v.* Lamb, Ambl. 309.

23. While it is a settled principle that courts of equity will not enforce an illegal trust,[1] yet, if a trust is once established as valid, neither the act of the law as distinguished from equity, nor of the trustee in dealing with the estate, can impair or affect the equitable estate of the *cestui quē trust*, unless it be by a conveyance which, from the circumstances under which it is made, will be held valid in order to prevent injustice being done to innocent parties; as where, for instance, a trustee, being in possession of the estate as the ostensible owner, conveys the same for a valuable con-
[*201] sideration to one who is ignorant of the trust.[2] *And this principle extends to mortgages.[3] On the other hand, no conveyance by a *cestui que trust* can divest the trustee of his legal estate.[4]

24. A trustee may devise his estate by his last will, in which case his devisee becomes substituted to his place, if the trust be a several one;[5] or, if he dies intestate, his estate will descend to his heirs, who are charged with the trust for which he held it.[6] Nor can such heir disclaim the trust, except by applying to the court to have another appointed in his place.[7] This does not apply, of course, in the case of several trustees, where, as is usually the case, they are joint-tenants, except at the death of the last survivor, since in such a case the survivor takes the whole, and the heir nothing, unless he is heir of the last survivor. Nor does it apply where the trust is a special and personal one in the original trustees.[8]

[1] Willis, Trust. 38; Attorney-General *v.* Pearson, 3 Meriv. 399. For what would be illegal trusts, see Willis, Trust. 38, Law Lib. ed. note.

[2] Wolfe *v.* Bate, 9 B. Mon. 208; Major *v.* Deer, 4 J. J. Marsh. 585; Boynton *v.* Hoyt, 1 Denio, 53; 2 Fonbl. Eq. 167 and n.; 1 Cruise, Dig. 449; Pye *v.* Gorge, 1 P. Wms. 128; Reading of Trowbridge, 3 Mass. 577; Hill, Trust. 282; Thomson *v.* Gilliland, Addis. 296; Conner *v.* Tuck, 11 Ala. 794; Bumpus *v.* Platner, 1 Johns. Ch. 213; Brydges *v.* Brydges, 3 Ves. 127; Selby *v.* Alston, 3 Ves. 341, 342, note; Den *v.* Troutman, 7 Ired. 155.

[3] 2 Fonbl. Eq. 167, note; Finch *v.* Winchelsea, 1 P. Wms. 278.

[4] 1 Cruise, Dig. 407.

[5] Lewin, Trusts, 218; Marlow *v.* Smith, 2 P. Wms. 198; Titley *v.* Wolstenholme, 7 Beav. 425; 1 Cruise, Dig. 407.

[6] Hill, Trust. 303; Boone *v.* Chiles, 10 Pet. 213; Duffy *v.* Calvert, 6 Gill, 487; Willis, Trust. 53; 4 Kent, Com. 311, 8th ed. note; Shortz *v.* Unangst, 3 W. & S. 45.

[7] Lewin, Trusts, 238; Hill, Trust. 303. [8] Hill, Trust. 303.

25. As the owner of the legal estate, a trustee may convey the same, and thereby pass the legal title to the same to his grantee. And an innocent purchaser from a trustee will hold the estate discharged of the trust, although it be a constructive one, and made such by the fraud of the vendor.[1] But if the conveyance be what is called a voluntary one, that is, without consideration, or if, though with a consideration, it be made to one cognizant of the trust, the grantee will take the estate subject to the trust, and become as to it a trustee in place of his grantor.[2] It has accordingly been held, that the purchaser of an estate at a sheriff's sale takes it discharged of all secret trusts of which he had no notice.[3] And it was further * held, that a trust in respect to such [*202] estate could not be established by parol.[4]

26. The power of a trustee to convey an absolute estate to an innocent purchaser is so well recognized, that even trustees, to preserve contingent remainders, may, by joining with the tenant for life whose estate was to support the contingent remainder, convey a good estate, and defeat the remainder before it becomes vested. But if the purchaser knew of the trust, he would himself become the trustee.[5] This, however, is stated rather by way of illustration than as having any practical bearing, since in few if any of the States can a contingent remainder now be defeated by a conveyance of the particular estate that supports it; and it is, moreover, rarely possible for one to convey a trust-estate without notice, where the instrument by which the estate is held contains a declaration of the trust, from the universal rule requiring deeds to be recorded.

27. If the legal and equitable estates in land become united in the same person in any way, the trust is extinguished, since no man can be a trustee for himself,[6] and the equitable is

[1] Dennis *v.* McCagg, 32 Ill. 445.

[2] Willis, Trust. 84; Hill, Trust. 175, 282; Co. Lit. 290 b, n. 249, § 2; Hallett *v.* Collins, 10 How. 174; Heth *v.* Richmond Railroad Co., 4 Gratt. 482; Den *a* Troutman, 7 Ired. 155; Lee, Abst. 237.

[3] Smith *v.* Painter, 5 S. & R. 223.

[4] Leshey *v.* Gardner, 3 W. & S. 314.

[5] 2 Flint, Real Prop. 787.

[6] Healy *v.* Alston, 25 Miss. 190; 3 Prest. Conv. 314, 327; Butler *v.* Godley,

merged in the legal estate.[1] Thus where one, who was a trustee for his children, made a general devise of his estate to them, and died, it was held, that whether the legal estate thereby became vested in them, or descended to them by act of law, the legal estate having become united with the equitable one, the latter was merged in the former, and the children thereby became absolute owners thereof.[2] And the same would be the effect if the trustee buy the interest of the *cestui que trust*, which he may do if done with good faith.[3] But, to have the union operate a merger, the estates must unite in one and the same person, having a commensurate and [*203] * coextensive interest in each, with no intervening interest in another. A legal estate in fee in one who has only a partial equitable interest, or *vice versa*, would not merge.[4] To have this effect, moreover, the trustee must not have acquired the estates by violating any duty belonging to him as trustee; as, for instance, by purchasing himself the trust-property held by him in trust to sell.[5] If the trustee be one of the beneficiaries of the trust, he is the absolute owner of a share of the estate equal to his interest.[6]

28. Where an estate is conveyed to a married woman, expressly to her sole and separate use, a court of equity will hold her husband as her trustee, and not allow him to claim the rents and profits thereof as his own; and if he become bankrupt, these will not pass to his assignees.[7] So a husband, before marriage, may, by contract in writing, invest his future

1 Dev. 94; Nicholson *v.* Halsey, 1 Johns. Ch. 422; Brydges *v.* Brydges, 3 Ves. 126; 1 Spence, Eq. Jur. 508; 2 Flint, Real Prop. 774; Hill, Trust. Whart. ed. 252 and note for American cases; Lewin, Trusts, 18.

[1] Hopkinson *v.* Dumas, 42 N. H. 306, 308; Nicholson *v.* Halsey, 1 Johns. Ch. 417; Gardner *v.* Gardner, 3 Johns. Ch. 53.

[2] Cooper *v.* Cooper, 1 Halst. Ch. 9.

[3] Lewin, Trusts, 363, 364; Downes *v.* Grazebrook, 3 Meriv. 208. See Ayliffe *v.* Murray, 2 Atk. 59.

[4] Lewin, Trusts, 18; Hill, Trust. 252; Selby *v.* Alston, 3 Ves. 339, 342, note; Goodright *v.* Wells, Doug. 771; Donalds *v.* Plumb, 8 Conn. 453; Brydges *v.* Brydges, 3 Ves. 126; James *v.* Morey, 2 Cow. 284; Hunt *v.* Hunt, 14 Pick. 374, 384.

[5] 1 Spence, Eq. Jur. 572; 2 Flint, Real Prop. 811.

[6] Mason *v.* Mason, 2 Sandf. Ch. 432, 459, s. c. Mason *v.* Jones, 2 Barb. 229, 242; James *v.* Morey, 2 Cow. 284, per Woodworth, J.

[7] 2 Flint, Real Prop. 797; Willis, Trust. 33; Sand. Uses, 349; Bennet *v* Davis, 2 P. Wms. 316; Porter *v.* Bank of Rutland, 19 Vt. 410.

wife with the power of separate enjoyment and disposal of an estate, which power equity will support and enforce if it is distinct and unequivocal in its character.[1] But the law does not change the legal estate into an equitable one, or affect the legal ownership of the same, by making the husband her trustee in respect to the same.[2]

29. But there is, after all, a principle recognized by courts of equity, which controls their decisions in all questions of merger of the equitable in the legal estate; and that is, that if it is necessary for purposes of justice, or to effect the intent of the donor, that the two estates should be kept distinct, there will be no merger by their merely coming together in one person.[3]

* 30. It should be borne in mind, that, in its action [*204] upon trusts, equity can only reach the thing itself through the person of the trustee, and if he have not an estate in the land commensurate to the trust declared, equity cannot enlarge his estate.[4] "It is contrary to the principles of equity jurisprudence to make a court of equity perform the office of a court of common law."[5] Moreover, because equity acts only upon the person charged with a trust, he may be held to answer as to the nature and extent of the trust, though it is one which is susceptible of being proved *aliunde*.[6]

31. Trust terms long held an important place in the subject of trusts in England; but from the modification of the law in regard to them by statute 8 and 9 Vict. c. 112, and their not being in use in this country, it is not deemed advisable to add any thing upon the subject beyond what is found in a former part of this work.[7]

[1] 2 Flint, Real Prop. 798, 799.

[2] Tud. Lead. Cas. 485.

[3] Lewin, Trusts, 19; Brydges *v.* Brydges, 3 Ves. 126, 127; Donalds *v.* Plumb, 8 Conn. 453; James *v.* Morey, 2 Cow. 318; Hunt *v.* Hunt, 14 Pick. 374, 383; Gibson *v.* Crehore, 3 Pick. 475; Starr *v.* Ellis, 6 Johns. Ch. 393; Forbes *v.* Moffatt, 18 Ves. Sumn. ed. 384 and note; 3 Prest. Conv. 557; Laussat, Fonbl. Eq. 426 and notes. Earle *v.* Washburn, 7 Allen, 97.

[4] Co. Lit. 290 b, note 249, § 5.

[5] Sibley *v.* Rider, 54 Me. 467.

[6] Coates *v.* Woodworth, 13 Ill. 654.

[7] *Ante*, vol. 1, pp. *311-*313.

SECTION IV.

RIGHTS, POWERS, AND DUTIES OF PARTIES TO TRUSTS.

1–3. Who may be trustees, and who *cestuis que trust.*
4. Of dry and active trusts.
5. Of rules of law and rules of equity as to trusts.
6. Rules of law as to ownership and possession of the legal estate.
7. A trust may not be delegated by a trustee.
8. Several trustees constitute a single person.
9. In public trusts, majorities may act.
10. Trusts ordinarily survive if more than one trustee.
11. Powers must be jointly executed.
12. Of supplying places of joint-trustees.
13. Trustees not responsible for each other.
14, 15. Courts of equity enforce performance of trusts.
16. Trustee may not make profit to himself.
17, 18. Of the right of *cestui que trust* to control the estate.
19. When trustee may hold possession of the estate.
20. Liability of purchaser of trust-estate as to the fund.
21. Of compensation to trustees.

1. It remains to be considered what, if a trust as to lands is established, are the respective rights, powers, and duties of the trustees and *cestuis que trust* in respect to such trust-estates. In the first place, all persons capable of confidence and of holding real estate may be trustees, with the exception of married women, who are so far restricted that they cannot ordinarily be trustees for their husbands.[1] But in Iowa, Massachusetts, and Maine, it seems that wives may be trustees like *femes sole*.[2] So any person capable of taking any conveyance of land may acquire an equitable interest therein, and become a *cestui que trust*.[3] An infant may be a trustee, and compellable to execute his trust.[4]

[*205] 2. It is no objection to a person being a *cestui que trust* that *he is unknown or unascertained, or even not *in esse*, when the trust is created in his favor.

[1] Willis, Trust. 33; Sand. Uses, 349. And this includes the king in England, and a State in this country. Pinson *v.* Ivey, 1 Yerg. 325, 332.

[2] Claussen *v.* La Franz, 1 Iowa, 237, 239; Springer *v.* Berry, 47 Me. 338; *ante*, p. *174; Mass. Stat. 1869, c. 409.

[3] Willis, Trust. 34; Hill, Trust. 52.

[4] Irvine *v.* Irvine, 9 Wall. 69.

The trust takes effect in him whenever he is ascertained or comes into being. Nor will it affect the validity of the trust that the *cestui que trust* is ignorant of its creation, since he can enforce it when it comes to his knowledge.[1]

3. Nor are corporations incapable of being either trustees or *cestuis que trust* within the scope of the purposes for which they were created.[2]

4. What the rights and duties of trustees and *cestuis que trust* are must of course depend very much upon the nature of the trusts in respect to which they sustain these relations. But the interest of a *cestui que trust* is considered an interest in real estate within the meaning of the statute of frauds, so as to require a contract in relation to the same to comply with the requirements of that statute in order to be valid.[3] And in New Hampshire the interest of a *cestui que trust* in land may be levied on by a creditor as real estate.[4] Thus, in one class of these, the trustee simply holds the legal estate, while the law construes and determines the nature of the trust.[5] Such a one is called "a mere dry trustee."[6] But, in the class denominated special trusts, the trustee is required to exert himself actively in executing the same, as where the trust is to sell lands, pay debts, &c.[7]

5. The subject presents itself in two points of view: one respects the manner in which they are regarded by courts of law, the other the rules by which they are governed by courts of equity. By the common law, the trustee, as owner of the legal estate, might convey or incumber it during his life, and dispose of it at his death; or, in case of his dying intestate, it would descend to his heirs.[8] But in equity, whoever purchases or acquires the legal estate from the trustee, with the

[1] Willis, Trust. 35; Hill, Trust. 52, and note for American cases; Ashhurst *v.* Given, 5 Watts & S. 323; Bryant *v.* Russell, 23 Pick. 508, 520. Devises for charitable and religious uses come under this rule. Vidal *v.* Girard, 2 How. 193, 196; Bartlet *v.* King, 12 Mass. 537; Going *v.* Emery, 16 Pick. 107, 118; Inglis *v.* Trustees S. S. Harbor, 3 Pet. 99; Miller *v.* Chittenden, 2 Iowa, 315 *et seq.*

[2] Phillips Academy *v.* King, 12 Mass. 546; Sutton *v.* Cole, 3 Pick. 232; Willis, Trust. 33–35; 1 Cruise, Dig. 403; Amherst Academy *v.* Cowls, 6 Pick. 427; Vidal *v.* Girard, 2 How. 127; Ang. & Ames, Corp. § 168.

[3] Richards *v.* Richards, 9 Gray, 314.

[4] Upham *v.* Varney, 15 N. H. 464.

[5] Lewin, Trusts, 23.

[6] Hill, Trust. 278.

[7] Lewin, Trusts, 2d ed. 23.

[8] *Ante*, p. *201.

exceptions mentioned on a former page, holds it him-
[*206] self as trustee for the * benefit of the *cestui que trust;* and neither he nor his grantee can incumber it, or charge it with his own debts, or render it subject to the dower or curtesy of his wife or her husband. The trust fastens upon the land, and supersedes all these charges and incumbrances.[1] But a conveyance in which both the trustee and *cestui que trust* join will pass a clear title to the purchaser, if they are otherwise competent to make a deed.[2]

6. Thus a trustee may not only bring and maintain an action in a court of law respecting the estate held in trust, but he is the only one who can maintain such action, since a *cestui que trust*, though in equity the owner of the estate, is a stranger to it in the eye of the law, or at best a mere tenant at will or at sufferance. And, while holding under his trustee, he cannot be said to be so adversely possessed as to affect a conveyance made by the trustee of the legal estate.[3] But one trustee cannot sue a co-trustee in trespass, in respect to the trust-estate, so long as he remains a trustee.[4] The trustee may recover in ejectment in a court of law against his own *cestui que trust*.[5] And, as a duty corresponding to this legal ownership of the trust-estate, a trustee is bound to cause the taxes, the interest on incumbrances, assessments, and expenses of repairs upon the premises, to be paid out of the income of the estate.[6]

7. In those cases where there is a confidence in the trustee, and this is always deemed to be the case, unless the instrument creating the trusts authorizes the employment of another, and a delegation of power to such third person, the office and duty of a trustee cannot be delegated except so

[1] *Ante*, p. *201.

[2] Parker *v.* Converse, 5 Gray, 336.

[3] Newton *v.* McLean, 41 Barb. 289.

[4] Trustees, &c. *v.* Stewart, 27 Barb. 553.

[5] Lewin, Trusts, 475; 1 Cruise, Dig. 414; Mordecai *v.* Parker, 3 Dev. 425; Russell *v.* Lewis, 2 Pick. 508, 510; Allen *v.* Imlet, 1 Holt, 641; Hill, Trust. 274, and Wharton's note for American cases. But see Kennedy *v.* Fury, 1 Dall. 72; *ante*, vol. 1, pp. *376, *377; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Peabody *v.* Harvard College, 10 Gray, 283; Essex Co. *v.* Durant, 14 Gray, 447; Brown *v.* Combs, 5 Dutch. 36, 40.

[6] Hepburne *v.* Hepburne, 2 Bradf. 74.

far as relates to ministerial acts, where he may employ an agent who governs himself by his advice and direction in the management of the trust, he being responsible for his agent's acts.[1] Thus, where testator devised his estate to his executors to sell, they may act, in so doing, by attorney; but it would be otherwise in executing a naked power.[2]

8. Where several are named as trustees, they constitute together but one trustee, and must execute the trust together in order to act at all, the act of one having no effect.[3] A sale, therefore, by one of two trustees, would be void, since trustees cannot act separately,[4] unless the authority be "to them or either of them;"[5] and although joint-tenants, neither can sell his interest in lands held by them as trustees.[6] And in Kentucky, if one of two trustees vacate the office, the other is, by statute, authorized to act.[7]

9. But this strictness applies only to cases of private trustees, and in relation to private trusts. If the trust be of a public nature, it may be executed by a major part of those constituting the trust.[8]

*10. As a general rule, moreover, if several are [*207] named as trustees, and one or more of them die, the legal estate and trust go to the survivors, as being joint-tenants thereof. But this may be limited by restricting the execution of the trust to all, in which case the death of either prevents the others from acting; or to the *survivors* in the plural number, when it may be executed so long as two survive, but a sole survivor cannot act.[9]

[1] Hill, Trust. 175, 540; Cole *v.* Wade, 16 Ves. Sumn. ed. 28 and note; Lewin, Trusts, 228; 1 Sugd. Pow. ed. 1856, 214; Sinclair *v.* Jackson, 8 Cow. 582.

[2] Bergen *v.* Duff, 4 Johns. Ch. 368; May's Heirs *v.* Frazer, 4 Lit. 391.

[3] Lewin, Trusts, 237; Hill, Trust. Whart. ed. 305, and note for American cases; Story, Eq. Jur. § 1280; Sinclair *v.* Jackson, 8 Cow. 543; 1 Cruise, Dig. 455; Latrobe *v.* Tiernan, 2 Md. Ch. Dec. 474; Peter *v.* Beverly, 10 Pet. 532; Green *v.* Miller, 6 Johns. 39.

[4] Ridgeley *v.* Johnson, 11 Barb. 527; Wilbur *v.* Almy, 12 How. 180.

[5] Taylor *v.* Dickinson, 15 Iowa, 484. [6] Sinclair *v.* Jackson, 8 Cow. 583.

[7] Wells *v.* Lewis, 4 Met. (Ky.) 271.

[8] Hill *v.* Josselyn, 13 Smedes & M. 597; Chambers *v.* Perry, 17 Ala. 726; Lewin, Trusts, 37; Wilkinson *v.* Malin, 2 Tyrwh. 544.

[9] Lewin, Trusts, 2d ed. 239; Co. Lit. 113 a; Hill, Trust. 303, and Wharton's note; Peter *v.* Beverly, 10 Pet. 564; Franklin *v.* Osgood, 14 Johns. 553; Cole *v.* Wade, 16 Ves. Sumn. ed. 28, note; Lee, Abst. 237; Zebach *v.* Smith, 3 Binn. 69; Bergen *v.* Duff, 4 Johns. Ch. 368.

11. But where a power without an interest is given to several, they must all join in executing it; and it does not survive if one dies before the execution, unless the survivors are expressly authorized to act by the instrument appointing them.[1] Another important distinction between trusts and powers is, that trusts are always imperative, and bind the conscience of the trustee, and may be enforced accordingly; whereas powers leave the act to be done a matter of election with the party to whom they are given.[2]

12. The same rule applies as to joint-trustees if one or more decline to act. But it seems that there is a power in courts of equity to substitute and supply trustees in all cases where it is necessary to effect the intention of the trust, unless there is a special confidence implied in the trustees named; in which case, if they refuse to act, or die, the trust may fail.[3] And the rule is laid down as a universal one, that, "as trusts are now regulated, all persons who take through or under the trustee shall be liable for the execution of the trust."[4]

13. As a general proposition, where there are two or more trustees, neither is responsible for the acts of the others, nor for their defaults, unless he joins with them in the act done, or unless the act complained of was done by reason of his own default or violation of duty; though to explain and illustrate the limitations and qualifications of this rule, as well as the various forms in which it is implied, would extend this inquiry beyond its proposed limits.[5]

[*208] *14. Though courts of law have cognizance, as has been shown, of the legal estates of trustees, courts of

[1] Stewart *v.* Pettus, 10 Mo. 755; Lee, Abst. 338; Cole *v.* Wade, 16 Ves. 27; Townsend *v.* Wilson, 1 B. & Ald. 608; Lewin, Trusts, 2d ed. 239; Co. Lit. 112 b; Osgood *v.* Franklin, 2 Johns. Ch. 20; Franklin *v.* Osgood, 14 Johns. 553; Peter *v.* Beverly, 10 Pet. 564; Zebach *v.* Smith, 3 Binn. 69; Williams *v.* Otey, 8 Humph. 563; Gray *v.* Lynch, 8 Gill, 403; 4 Kent, Com. 325; 1 Sugd. Pow. 143.

[2] Stanley *v.* Colt, 5 Wall. U. S. 168; 2 Sugd. Powers, 588.

[3] Hill, Trust. 191, 211, and Wharton's note for American cases, 211; Lewin, Trusts, 2d ed. 239; Burrill *v.* Shiel, 2 Barb. 457; Lee, Abst. 238.

[4] Lewin, Trusts, 2d ed. 218.

[5] Story, Eq. Jur. § 1280; Ward *v.* Lewis, 4 Pick. 518, 524; Spalding *v.* Shalmer, 1 Vern. 303; 1 Cruise, Dig. 455, note; Kip *v.* Deniston, 4 Johns. 23; Willis, Trust. 194; Latrobe *v.* Tiernan, 2 Md. Ch. Dec. 474; Hill, Trust. 309, Wharton's note for American cases; Towne *v.* Ammidown, 20 Pick. 535.

equity exercise control over trustees whenever it is necessary, in order to enforce the execution of trusts, or grant relief where trustees neglect or violate such trusts.[1] And it is always competent for trustees, in matters of doubt, to ask and receive directions from courts of equity in the execution of their trusts.[2]

15. And whether a trustee has an equitable right or not to convey a trust-estate is a question purely within the cognizance of equity.[3] So is the question, whether a grantee in a deed of trust has undertaken the trust or not.[4] And this jurisdiction these courts will exercise in aid of a *cestui que trust*, against a trustee or any other person who derives any benefit from the trustee's acts.[5]

16. But it is the *cestui que trust* who is, in the eyes of *equity*, the owner of the estate, so far as the ownership may be necessary to insure to him that enjoyment of the estate which the donor or devisor intended. In contemplation of a court of equity, a *cestui que trust* is actually seised of the freehold. He may alien it, and any conveyance by him made will have the same operation, in equity, upon the trust, as a like conveyance would have had, at law, upon the legal estate. It is descendible, devisable, and alienable; and, generally, whatever is true at law of the legal estate is true in equity of the trust-estate.[6] It will not allow the trustee the least personal advantage from the trust-estate, — a rule which is universal and absolute, subject to no qualifications or exceptions.[7] Even the right of homestead, favored as it is by law, does not attach to the estate of a trustee.[8] This principle is extended by the courts to the "extremest length," in

[1] Co. Lit. 290 b, n. 249, § 5; Presley *v.* Stribling, 24 Miss. 527; Robinson *v.* Mauldin, 11 Ala. 977; Jones *v.* Dougherty, 10 Ga. 373; Tucker *v.* Palmer, 3 Brev. 47.

[2] Attorney-Gen. *v.* Moore, 4 C. E. Green, 519.

[3] Den *v.* Troutman, 7 Ired. 155.

[4] McLean *v.* Nelson, 1 Jones, N. C. 396. [5] Bush *v.* Bush, 1 Strob. Eq. 377.

[6] Croxall *v.* Shererd, 5 Wall. U. S. 281.

[7] Davis *v.* Wright, 2 Hill (S. C.), 560; Arnold *v.* Brown, 24 Pick. 89; Green *v.* Winter, 1 Johns. Ch. 20; Oliver *v.* Piatt, 3 How. 333; Hill, Trust. 535; Lewin, Trusts, 2d ed. 258; Conger *v.* Ring, 11 Barb. 356; Shelton *v.* Homer, 5 Met. 462; Jamison *v.* Glascock, 29 Mo. 191.

[8] Shepherd *v.* White, 11 Tex. 354.

holding agents and those occupying fiduciary relations to the property to the strictest fairness and integrity towards their principals, and to prevent them from making use of their position to benefit themselves at the expense or disadvantage of their principals.[1] And this applies also to one who acts as next friend of an infant in making partition of lands.[2] Accordingly, if he buys in an incumbrance on the estate for a less sum than is actually due upon it, it enures to the benefit of the *cestui que trust*.[3] If he lays out trust-money in buying lands, and sells the same, and makes a profit thereby, the *cestui que trust* is entitled to it.[4] So if he buys what he has been constituted trustee to sell, and makes an advance by selling it again, his *cestui que trust* can compel him to account [*209] *for such advance.[5] And if a trustee to sell land buy it in himself, it is an inflexible rule that the *cestui que trust* may set aside the transaction at his election, within a reasonable time after it becomes known to him, upon repaying the trustee the moneys he may have paid out on account of the same.[6] The doctrine, that no one acting for another in making the sale of land shall directly or indirectly become the purchaser against the intelligent consent of him for whom he acts, applies to purchasers by persons acting in any fiduciary character.[7] And among these has been included

[1] Fairman *v.* Bavin, 29 Ill. 76; Saltmarsh *v.* Beene, 4 Porter, 292.

[2] Collins *v.* Smith, 1 Head, 251.

[3] Green *v.* Winter, 1 Johns. Ch. 20; Lewin, Trusts, 2d ed. 258; Wiswall *v.* Stewart, 32 Ala. 433.

[4] Lewin, Trusts, 2d ed. 259; Moffit *v.* McDonald, 11 Humph. 457.

[5] Wasson *v.* English, 13 Mo. 176.

[6] Lewin, Trusts, 2d ed. 360, 366; Follansbe *v.* Kilbreth, 17 Ill. 522; Brothers *v.* Brothers, 7 Ired. Eq. 150; Pitt *v.* Petway, 12 Ired. 69; Den *v.* Wright, 2 Halst. 175; Michoud *v.* Girod, 4 How. 503; Arnold *v.* Brown, 24 Pick. 89, 96; Jackson *v.* Walsh, 14 Johns. 407; Jennison *v.* Hapgood, 7 Pick. 1, 8; Jackson *v.* Van Dalfsen, 5 Johns. 43; Campbell *v.* Penn. Life Ins. Co., 2 Whart. 53; Pratt *v.* Thornton, 28 Me. 355; Mason *v.* Martin, 4 Md. 124; Sollee *v.* Croft, 7 Rich. Eq. 34; Obert *v.* Obert, 1 Beasley (N. J.), 423; Ricketts *v.* Montgomery, 15 Md. 46; Bank, &c. *v.* Dubuque & Pac. Railroad Co., 8 Iowa, 277; Fears *v.* Lynch, 28 Ga. 249; MacGregor *v.* Gardner, 14 Iowa, 326, 339; Wormley *v.* Wormley, 8 Wheat. 441; Phares *v.* Barbour, 49 Ill. 371.

[7] Hoffman, &c. Co. *v.* Cumberland, &c. Co., 16 Md. 507; Michoud *v.* Girod, 4 How. 503. But see McKay *v.* Young, 4 H. & Mum. 430; Brannan *v.* Oliver, 2 Stew. 47; and Saltmarsh *v.* Beene (*sup.*), limiting what is said there.

the clerk of a broker who is employed to make the sale, who has access to the correspondence between the landholder and the broker. He would, if he purchased, become a trustee of the vendor, and be accountable for the value of the land.[1] So also with the agent or solicitor of the vendor, though such solicitor be employed by a mortgagee under a power of sale mortgage.[2] And this was extended to the attorney of a guardian who purchased an estate sold by the guardian, and the sale was set aside. But, the purchaser having mortgaged the estate to one who was innocent of any knowledge of the transaction, it was held that the wards of the guardian must take the estate subject to the mortgage.[3] But there is no objection beyond the general suspicion resting upon such a transaction, in an administrator, for instance, immediately after selling land, becoming a purchaser of his own vendee, if such purchase was independent of the sale made by him in his fiduciary character.[4] But such a sale is only voidable, and not void. Nor can it be avoided by any one but the *cestui que trust* or his heirs.[5] And a forbearance to exercise this right for a long time is held to be equivalent to a ratification of the sale.[6] In ordinary cases of trust other than for the sale of land, a trustee is not precluded from purchasing the interest of his *cestui que trust* if done *bona fide;* though, as a transaction, it is always looked upon by equity with great jealousy.[7] So where the owner of property confessed judgment to A, in order to have the property sold, and out of the proceeds to pay debts, and the officer sold it on execution, it was held that A might become a purchaser at such sale, since, as no title passed to him by the judgment, he did not become a trustee, and the sale was made by the officer.[8]

[1] Gardner *v.* Ogden, 22 N. Y. 327; *ante*, p. *177.

[2] Downes *v.* Grazebrook, 3 Meriv. 209; Twining *v.* Morrice, 2 Bro. C. C. 326.

[3] Walker *v.* Walker, 101 Mass. 169.

[4] Wortman *v.* Skinner, 1 Beasley (N. J.), 358.

[5] Painter *v.* Henderson, 7 Penn. St. 48.

[6] Mitchell *v.* Berry, 1 Met. (Ky.) 602; *ante*, p. *177.

[7] Lewin, Trusts, 2d ed. 363; Costen's Appeal, 13 Penn. St. 292; Allen *v.* Bryant, 7 Ired. 276; Bryan *v.* Duncan, 11 Ga. 67; Jones *v.* Smith, 33 Miss. 215; *ante*, p. *177.

[8] Sheldon *v.* Sheldon, 13 Johns. 220.

17. Although it is so often laid down by courts and writers that *cestuis que trust* have a right to compel their trustees to suffer them to occupy the trust-estates, and to require of them to make conveyances thereof as the *cestuis que trust* shall direct,[1] and it has accordingly been held that a sale by a trustee, by consent of a *cestui que trust*, would pass a good title,[2] it is apprehended that the general proposition can be true, to its full extent, only in respect to *simple*, or what are sometimes called *dry* trusts, where the *cestui que trust* is entitled [*210] to the exclusive * benefit of the land, and the trustee is, by nature of the trust, merely passive in respect to it.[3] The cases above referred to are those where the pernancy of the profits, and the disposition of the estate, the *jus habendi* and the *jus disponendi*, are intended to be in the *cestui que trust;* for, when other parties are interested in the estate, it rests in the discretion of the court whether the actual possession shall remain with the *cestui que trust* or the trustee; and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions.[4] But where land was conveyed to A in trust for B during her life, and then in trust for such of her children as should be living at her death, the court refused her application to have the trustee convey the estate to her as tenant in tail to enable her to bar the remainder, it being a contingent one.[5]

18. Where it is a simple or dry trust, courts of equity will give the *cestui que trust* possession, or require the trustee to convey the estate as the *cestui que trust* may direct.[6] But a trustee can only be divested of his right of possession by a decree of a court of equity.[7] If trusts are passive, the *cestuis que trust* have a right to control the estate; if active, then the

[1] 1 Cruise, Dig. 448; Lewin, Trusts, 2d ed. 470; Hill, Trust. 278.

[2] Arrington *v.* Cherry, 10 Ga. 429.

[3] Lewin, Trusts, 2d ed. 470; 1 Cruise, Dig. 449; Hill, Trust. 273, 279; Battle *v.* Petway, 5 Ired. 576; Vaux *v.* Parke, 7 W. & S. 19; Barnett's Appeal, 46 Penn. St. 399.

[4] Lewin, Trusts, 2d ed. 470, 480; Hill, Trust. 278; Battle *v.* Petway, 5 Ired. 576; Williamson *v.* Wilkins, 14 Ga. 416; Shankland's Appeal, 47 Penn. St. 113.

[5] Harris *v.* McElroy, 45 Penn. 216.

[6] Hill, Trust. 278; Lewin, Trusts, 2d ed. 470; Stewart *v.* Chadwick, 8 Iowa, 469.

[7] Guphill *v.* Isbell, 1 Bail. 230; Presley *v.* Stribling, 24 Miss. 527.

trustees. Passive trustees cannot recover the land from the possession of the *cestui que trust* or his assignee, and such *cestui que trust* may compel the trustee to convey the estate for his benefit. The trust which arises in favor of one who pays the consideration upon the purchase of an estate is a passive one.[1] In a court of law, on the contrary, a *cestui que trust* is a tenant at will or at sufferance of his trustee; and the latter may recover against him in an action of ejectment for the possession of the premises, and he will not be admitted to deny his trustee's title. And if, in the case of an express trust, he enters into the premises in accordance with the terms thereof, the mere possession by him, and receiving the rents and profits, cannot be adverse.[2] Nor can a *cestui que trust* maintain such an action in his own name against any other tenant; for, in ejectment, the legal title alone is the matter regularly put in issue.[3] If he sues at all, it must be in the name of his trustee, even though the trust be that of a mortgage.[4] The law in some of the States admits of an exception to this rule, so far that, if entitled to the enjoyment of the estate, a *cestui que trust* may maintain ejectment in his own name.[5]

[1] Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Sawyer *v.* Skowhegan, 57 Mo. 500–508.

[2] Ripley *v.* Bates, 110 Mass. 162.

[3] Heard *v.* Baird, 40 Miss. 800.

[4] *Ante*, vol. 1, p. *377; Matthews *v.* Ward, 10 Gill & J. 456; Jackson *v.* Pierce, 2 Johns. 226; Beach *v.* Beach, 14 Vt. 28; Gunn *v.* Barrow, 17 Ala. 743; Lewin, Trusts, 2d ed. 476. See Hill, Trust. 274, Wharton's note, for the American cases on the question who shall bring actions in regard to the legal estate; Jackson *v.* Van Slyck, 8 Johns. 487; Jackson *v.* Deyo, 3 Johns. 422; Goodtitle *v.* Jones, 7 T. R. 47; Doe *v.* Wroot, 5 East, 132; Roe *v.* Read, 8 T. R. 123; Norton *v.* Leonard, 12 Pick. 152; Somes *v.* Skinner, 16 Mass. 348. So the trustee may have waste against his *cestui que trust*. Woodman *v.* Good, 6 W. & S. 169; White *v.* Albertson, 3 Dev. 241; Freeman *v.* Cooke, 6 Ired. Eq. 373.

[5] In Mississippi, where a trust has been satisfied. Brown *v.* Doe, 7 How. (Miss.) 181. The contrary is held in Ohio. Moore *v.* Burnet, 11 Ohio, 334. But in Pennsylvania the *cestui que trust* may sue if entitled to the enjoyment of the estate. Presbyterian Cong. *v.* Johnston, 1 W. & S. 9; School Directors *v.* Dunkleberger, 6 Penn. St. 29. Real estate or any interest therein held in trust is liable to process at law against the *cestui que trust* in the following States by statute: in New York, 2 Rev. Stat. 4th ed. p. 616, § 35; Stat. at Large, vol. 2, p. 381, § 26; in Maryland, Stat. 1795, c. 56, and Stat. 1810, c. 160; Code, 1860, vol. 1, art. 83, p. 586; in Virginia, Code, 1849, p. 502, c. 116, § 16; 1873, c. 113, § 16; in North Carolina, Rev. Code, 1854, c. 45, § 4, p. 275; Battle's Revis. 1873, c. 44, § 4; in Kentucky, 2 Rev. Stat. 1860, Stanton's ed. c. 80. § 23, p. 230; Gen.

[*211] *19. If the trust be a special one, the trustee may exercise a proprietary power and control over the trust-estate, so far as the execution of the trust may render it necessary to invest him with these.[1] And where the power of a trustee ceases by the limitation contained in the trust itself, he can no longer hold possession of the estate, and may be compelled to reconvey it.[2]

20. There is one class of trusts where equity follows the estate into the hands of *bona fide* purchasers, although the sale be made in conformity with the power and duty of the trustee; and that is where devises of lands are made to trustees to sell for the payment of certain specific debts, or to apply the money to certain specific purposes. The purchaser in such cases is bound to see that the money is properly applied; otherwise the land may be charged in such purchaser's hands with the trust of paying such debts or the execution of such purpose.[3] But this doctrine is confined to cases where the trust is of a limited and defined nature, and does not extend to one of a general character, such as the payment of a testator's debts or legacies generally, without specifying or defining them. And the reason for the distinction is, that in one case the purchaser is apprised, by the terms of the power of the trustee, of the specific purposes for which the money is to be applied, and may protect himself by seeing [*212] that this is done; in the other he has no *means of knowing what debts, and the like, are to be paid, nor to whom.[4] So where the trustee is to sell at his discretion at

Stat. 1873, c. 63, § 21, p. 588; in Georgia, Cobb's New Dig. 1851, p. 1128, § 10, re-enacting Stat. 29 Charles II. c. 3. The trust-estate is liable for debts of *cestui que trust* for necessaries furnished in case the trustee does not provide them. Code, 1873, § 2336, p. 403; in Mississippi, Rev. Code, 1857, p. 308, art. 12; Rev. Code, 1871, § 2295, p. 501; in Arkansas, Dig. Stat. 1858, p. 505, c. 68, § 33; in Indiana, 2 Rev. Stat. 1852, p. 153, § 526; 2 Stat. 1862, p. 263, § 526.

[1] Lewin, Trusts, 2d ed. 470; Hill, Trust. 273; McCosker *v.* Brady, 1 Barb. Ch. 329; Barnett's Appeal, 46 Penn. St. 399.

[2] Waring *v.* Waring, 10 B. Mon. 331.

[3] Story, Eq. Jur. § 1127; Duffy *v.* Calvert, 6 Gill, 487; Gardner *v.* Gardner, 3 Mason, 218; Dunch *v.* Kent, 1 Vern. 260; Spalding *v.* Shalmer, 1 Vern. 301; 1 Cruise, Dig. 450.

[4] Story, Eq. Jur. § 1130; 1 Cruise, Dig. 451; Potter *v.* Gardner, 12 Wheat. 498; Andrews *v.* Sparhawk, 13 Pick. 393; Stall *v.* Cincinnati, 16 Ohio St. 169 177; Urann, Coates, 117 Mass. 44.

public or private sale, the purchaser is not bound to see to the application of the purchase-money. And when the trust is recorded, the purchaser is charged with notice of what it is. And if the sale were made for other purposes than the execution of the trust, the court may in their discretion set it aside if this was known to the purchaser.[1] And where executors were authorized to sell, if in their judgment it should be necessary, a purchaser is not bound to see to the application of the purchase-money.[2]

21. Formerly it was a doctrine of universal application, that, a trust being a matter of honor and personal confidence, a trustee was not entitled to charge compensation for his services. But this has not been generally adopted in this country, and the doctrine is undergoing a change in England.[3] In Illinois, he can only charge for necessary expenditures incurred in preserving and managing the trust-property, unless a compensation be previously stipulated for. And the same rule prevailed in New Jersey till the subject was regulated by statute.[4]

SECTION V.

TRUSTS UNDER THE LAW OF NEW YORK.

THE law as to trusts as well as uses has been materially modified by statute in New York, which has led to several important rulings of their courts, to which it is proposed briefly to refer, rather by way of showing what departures have been made from the general system of trusts, as above explained, than of giving a complete outline of the present system prevailing there.[5] The statute referred to is art. 2, tit. 2, c. 1,

[1] Nicholls *v.* Peak, 1 Beasley (N. J.), 69.

[2] Davis *v.* Christian, 15 Gratt. 11.

[3] Story, Eq. Jur. § 1268; Barrell *v.* Joy, 16 Mass. 221; Denny *v.* Allen, 1 Pick. 147; Meacham *v.* Sternes, 9 Paige, Ch. 398; Wagstaff *v.* Lowerre, 23 Barb. 209.

[4] Constant *v.* Matteson, 22 Ill. 546; Warbass *v.* Armstrong, 2 Stockt. Ch. 263.

[5] For much of what follows, reference has been had to "The Law of Real Property of the State of New York," by Mr. Lalor. The law of Alabama is substantially like that of New York on this subject. You *v.* Flinn, 34 Ala. 412, 413.

part 2d, of the Revised Statutes of New York of 1827. The object of the act was to abolish all trusts where, by the English statute of uses, the legal estate would be executed in the person entitled to the equitable estate, and to declare them legal estates in the *cestuis que trust*,[1] extending this principle to trust-terms where the *cestuis que trust* are to have the benefit of the possession of the estate.[2] So where the property conveyed in a deed has been given to the grantee merely, as a trustee for others, and not for his own benefit, he will take no legal title or beneficial interest under such deed.[3] And if the *cestui que trust* be not named or ascertained, the limitation would be wholly void.[4] Nor will the form in which [*213] * the trust is limited make any difference where the purpose and intention are to secure the enjoyment or possession of the property to another than the grantee named. Thus a limitation to A to his use, to the use of or in trust for B, would give nothing to A, and the legal and equitable estates would unite in B.[5] But what are known as active trusts are not affected by the statute: they remain as they were before its passage.[6] Thus a grant to A in trust to pay the rents to B, a married woman, during her life, and after her death to convey to her children, is a good trust-estate for the life of B.[7] In such case, the trust would cease at the death of the *cestui que trust* for life, and the remainder would become an executed use in the one who is to take the estate; as where the trust was for A during life, and at his death to convey the estate to B, the estate is executed in B without any further act by the trustee.[8] A grant in trust for two purposes, one lawful and the other not, would create a valid trust

[1] Lalor, Real Prop. 125; Coster *v.* Lorillard, 14 Wend. 365–399.

[2] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 47; Lalor, Real Prop. 155, 157; Nicoll *v.* Walworth, 4 Denio, 385; Knight *v.* Weatherwax, 7 Paige, Ch. 182.

[3] Lalor, Real Prop. 157; LaGrange *v.* L'Amoreux, 1 Barb. Ch. 18. So in Minnesota, Sumner *v.* Sawtelle, 8 Minn. 318.

[4] Hotchkiss *v.* Elting, 36 Barb. 44.

[5] Rev. Stat. 1827, and 5th ed. 1859, pt. 2, art. 2, tit. 2, c 1, § 49; Stat. at Large, vol. 1, p. 677, § 49; Lalor, Real Prop. 158; Wood *v.* Wood, 5 Paige, Ch. 596.

[6] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 48; Lalor, Real Prop. 157; Cushney *v.* Henry, 4 Paige, Ch. 345; Judson *v.* Gibbons, 5 Wend. 224.

[7] Wood *v.* Mather, 38 Barb. 477.

[8] Matter of Livingston, 34 N. Y. 567.

in respect to the lawful purpose, but be void as to the other.[1] Under the denomination of *active trusts*, which are recognized by the statute as valid, are, *first*, to sell for the benefit of creditors; *second*, to sell, mortgage, or lease for the benefit of legatees; *third*, to receive rents and profits, and apply the same to the use of any person; *fourth*, to receive rents and profits to accumulate for a period and purpose authorized by statute.[2] So a devise in trust to pay annuities out of real estate is held to be a valid trust.[3] Nor does the statute intend to affect implied or resulting trusts, except to limit their extent, confining them to cases where some improper advantage has been taken by the trustee of the confidence or situation of the *cestui que trust*.[4] It is accordingly provided, that no trust shall result where one pays money and the conveyance is made in the name of another, unless it is done without the knowledge or assent of the party paying the money, or unless the party paying the money have creditors, in which case a trust results in their favor. So if A purchases land with B's money, and takes a deed to himself, with the knowledge of the owner of the money, it will not raise a resulting trust in his favor.[5] A like rule prevails in Minnesota, Kentucky, Indiana, and Michigan. But in Minnesota, if one pays money for an estate, and takes a deed in another's name, it will be presumed to be a fraud, and will let in the creditors of the one paying the money, to levy upon it, unless the tenant can negative the fraud. And if, in Indiana, an agent pays his principal's money, and takes a deed in the name of a stranger, without the knowledge and assent of the principal, it will raise a trust in favor of the latter. In Michigan, a trust cannot be raised by parol.[6] In New York, creditors of

[1] Harrison *v.* Harrison, 36 N. Y. 548.

[2] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 55; Lalor, Real Prop. 167. See Gilman *v.* Reddington, 24 N. Y. 9.

[3] Mason *v.* Mason, 2 Sandf. Ch. 432.

[4] Lalor, Real Prop. 125, 159; Astor *v.* L'Amoreux, 4 Sandf. 524.

[5] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, §§ 51, 52; Lalor, Real Prop. 160–162; Norton *v.* Stone, 8 Paige, Ch. 222; Jencks *v.* Alexander, 11 Paige, Ch. 619; Brewster *v.* Power, 10 Paige, Ch. 562; McCartney *v.* Bostwick, 32 N. Y. 59.

[6] Minn. Comp. Stat. 382; Stat. at Large, 1873, vol. 1, c. 32, §§ 53, 54, p. 618; Sumner *v.* Sawtelle, 8 Minn. 318, 320; Graves *v.* Graves, 3 Met. (Ky.) 169;

one paying money for an estate where the deed is taken in a third person's name may resort to equity for reaching it for the purpose of satisfying their debts out of it. The statute raises and declares a trust in such cases in favor of the creditors of the one who pays the money.[1] But where a married woman paid the consideration, and the conveyance was without her knowledge taken to her brother, it was held to raise a resulting trust in her favor, and not to come within the statute of New York.[2] So where the parents of a minor, wishing to make an advancement to her, purchased an estate, and the deed was taken in the name of A, who paid no part of the purchase-money, it was held that a trust resulted in favor of the minor, which she could enforce against A in equity as trustee.[3] But if one pays another's money, and takes a deed to himself without the knowledge or [*214] assent of such other person, or * do this in violation of a trust, a trust results in favor of him whose money has been thus applied, as would have been the case before the statute.[4] No implied trust, however, will affect a purchaser without notice, who pays a valuable consideration for the estate.[5] Where there is an express trust, the whole estate is in the trustee. The *cestui que trust* takes no estate or interest in the lands, and can only enforce the trust in equity.[6] It was once held that the statute does not abolish public charitable trusts, but the courts will enforce them as before.[7] But later decisions seem to favor the idea that all charitable trusts, except such as are express and come within those excepted in the act abolishing uses and trusts, are included in the act, and are no longer valid.[8] And it was

Wynn *v.* Sharer, 23 Ind. 375, 377; Groesbeck *v.* Seeley, 13 Mich. 345; Mich. Comp. Stat. c. 86, §§ 7, 9; 1871, vol. 2, c. 148, §§ 7–9.

[1] McCartney *v.* Bostwick, 32 N. Y. 53, 59; Garfield *v.* Hatmaker, 15 N. Y. 475; Wood *v.* Robinson, 22 N. Y. 564.

[2] Lounsbury *v.* Purdy, 18 N. Y. 515; Day *v.* Roth, 18 N. Y. 448.

[3] Siemon *v.* Schurck, 29 N. Y. 598.

[4] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 53; Lalor, Real Prop. 164; Reid *v.* Fitch, 11 Barb. 399; Lounsbury *v.* Purdy, Id. 496.

[5] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 54; Lalor, Real Prop. 167.

[6] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 72; Lalor, Real Prop. 185.

[7] Williams *v.* Williams, 4 Seld. 525.

[8] Levy *v.* Levy, 33 N. Y. 97, 134, where Wright, J., examines the question at great length. See also Downing *v.* Marshall, 23 N. Y. 366.

finally settled that charitable trusts as understood in England are not excepted from the statute, if the trust be for the benefit of a class undefined and incapable of being ascertained with certainty. It is sufficient that the legatee is so described that he can be ascertained and known when the right to receive the legacy accrues.[1] As to the duration of trusts, the rule is that they will be held to continue so long as it may be necessary to accomplish the purposes for which they are created, and the estates of trustees cease as soon as the purposes cease for which the trust was created.[2] Where lands are devised to executors or trustees to sell, and they are not to receive the rents and profits, no estate vests in them, but a mere power only. And the same rule applies to all cases of express trusts which may be exercised under the form of a power. They are construed as giving, not an estate, but merely a power.[3] Upon the creation of a trust, whatever estate or interest is not embraced in the trust, or otherwise disposed of, remains in and reverts to the person who creates the estate of the trustees.[4] Where the trust is expressed in the instrument creating it, every sale or act of the trustee which is in contravention of the trust is void.[5] If the trust is not declared in the deed conveying the estate to the trustee, it is liable for the debts of the trustee in favor of subsequent creditors without notice of the trust, and shall be deemed his absolute property as to them, and purchasers from him, without notice, and for a *valuable considera- [*215] tion.[6] No one paying money in good faith to a trustee is to be responsible for its application.[7] Trust-estates do not descend to the heirs of trustees. If, at the death of a trustee, a trust is unexecuted, the estate vests in the court,

[1] Holmes *v.* Mead, 52 N. Y. 343.

[2] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, §§ 59, 79; Lalor, Real Prop. 176.

[3] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, §§ 70, 72; Lalor, Real Prop. 182, 185.

[4] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 74; Lalor, Real Prop. 187; James *v.* James, 4 Paige, Ch. 115.

[5] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 77; Lalor, Real Prop. 189.

[6] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 76; Lalor, Real Prop. 189.

[7] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 78; Lalor, Real Prop. 190.

who may execute the trust in person, or appoint a trustee for the purpose.[1] Trustees may resign by permission of the court, or may be removed for good cause; and in such cases the court may substitute new trustees in place of the old ones.[2]

[1] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, § 80; Lalor, Real Prop. 193.
[2] Rev. Stat. 1827, pt. 2, art. 2, tit. 2, c. 1, §§ 81–83; Lalor, Real Prop. 194–196.

CHAPTER IV.

REMAINDERS.

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*SECTION I. [*219]

NATURE AND CHARACTERISTICS OF REMAINDERS.

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25. Exceptions to the rule that remainder is defeated by loss of seisin.
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1. BEFORE proceeding to consider the remaining branches of the doctrine of uses, — namely, springing and shifting uses and powers, — it seems to be proper, if not necessary, to treat of the law of remainders, in order the better to understand the application of these branches to the general subject of future and contingent estates. Thus far, the interests in real property which have been treated of have had reference chiefly to the present and immediate possession or enjoyment of such property, applying the term *possession* to corporeal, and that of *enjoyment* to incorporeal, hereditaments. It is hardly necessary, however, to remind the reader, after what has been said from time to time of estates in expectancy, that among the qualities of the estates which have heretofore been described is that of a future possession and enjoyment, as distinguished from the present, which give to them the nature of incorporeal hereditaments, from being neither visible nor tangible, though having the capacity of becoming such.[1] In examining the subject, it will be found that much nice learning is involved in the discussion, growing out of, among other things, that imperative feudal dogma of the common law, that a distinct independent freehold estate in lands cannot be created to commence *in futuro*.[2] As such estates could only be created by livery of seisin, and there could be but one seisin in the proper feudal sense, one could not, in the nature of things, part with his seisin to another, and still retain it for any period, long or short.[3] The principal difficulty will be to show and illustrate under what circumstances [*220] * and how a future estate of freehold can be created in favor of any one without doing violence to this dogma.

Before undertaking to classify or describe the future and expectant estates in lands which are known to the law, it

[1] Wms. Real Prop. 195.
[2] In some States this is changed by statute, as in Indiana. 1 Rev. Stat. 266.
[3] Woods, Inst. 248; Co. Lit. 217 a; Barwick's case, 560, 94 b.

may be well to lay down, with as much distinctness as possible, a few leading principles which enter into the character of them all. There can, for instance, as already stated, be but one actual seisin of any estate at one and the same time; and that can only be in him who has a freehold therein.

2. An estate in fee-simple being considered an entire thing, of unlimited duration, is susceptible of being divided and carved up into any conceivable number of lesser estates. Any number of estates measured by terms of years, or lives of individuals, would not be equivalent to or commensurate with a fee-simple estate. After serving all these, there would still be a residue of estate remaining unexpired.

3. By the original theory and notion of the common law, this estate in fee-simple could only be predicated of something of a tangible, corporeal, and immovable character, like lands, the possession of which, under the name of *seisin*, could be delivered by one person to another, and become inseparably associated with the idea of complete ownership thereof. Though estates of less quantity or duration than a fee-simple became or were always known to the feudal and common law, none of these, if for a fixed period of years, or a period less than what might be the duration of a life, were deemed to be worthy the acceptance of a freeman. But if the estate were of the requisite duration to be regarded a freehold, the tenant became the vassal of the lord, charged with the services which belonged to the land, and entitled to the rights and privileges of the other vassals who held of the same lord. The evidence of this was his being clothed with the possession under the name of *livery of seisin*, and thereby becoming, from the nature of his holding or tenure, a freeholder, and his estate a freehold.

4. If the estate was less than a freehold, the tenant was not created such by livery of seisin, but was merely put into possession of the lands, and held them as agent or bailiff of the one who had the seisin, holding possession under him and keeping * his seisin good, since seisin and possession were so nearly identical that no one could have a seisin of land which was actually in the adverse possession of another. But where the possession was not adverse, it [*221]

might be held by one person subordinate to the seisin in another.

5. In order practically to apply these principles, which have been illustrated and explained in the early chapters of this work, to the theory of creating future estates in land, whose possession and enjoyment are postponed for a longer or shorter time, let it be supposed that the owner of a fee-simple wishes to create an estate in favor of A B for twenty years. To effect this, after entering into a proper contract, he simply puts A B into possession of the land, but does not part with his own seisin, though he does with his possession. So far as the seisin is concerned, A B is his bailiff, acting for him in keeping it.[1] Suppose, instead of simply creating this estate in A B, the owner has at the same time, and by the same deed, given to C D all his estate in the land except what was given thereby to A B, and A B has accepted this deed as the grant under which he is to hold his estate. He will in this way have assented to act for C D, as he would have acted for the owner in the former case supposed, so far as holding the seisin unimpaired for him as such owner, since that, in effect, was the condition upon which alone he entered upon his estate. The grantor, in the latter case, will have parted with his entire seisin, and transferred it to C D, through the agency of A B, when the latter has taken possession, in carrying into effect the grant in his own favor, and, *ipso facto*, become for that purpose the bailiff of C D.[2] In the cases above supposed, the estate in A B might as easily have been for life as for years, except that to make it for life there must have been a livery of seisin to the first taker, and the seisin and possession would both thereby have been intrusted to him, in order to enable him to meet the require-
[*222] ments of the feudal tenure. But as * the tenant takes by a deed which expressly recognizes a concurrent ownership of the land in another, out of whose larger estate his own has been derived as a part of the same, he is, by implication of law, regarded as holding in accordance with and

[1] Brodie *v.* Stephens, 2 Johns. 289.

[2] Co. Lit. 143 a, 2 Flint, Real Prop. 259; Watk. Conv. 175, 177, Coventry's note; Wms. Real Prop. 206; *ante*, vol. 1, pp. *36–*38.

not adversely to the title of the owner of the general fee, and as holding the seisin of the estate for the mutual benefit of both, according to their respective interests and estates. Consequently, for the purposes of keeping alive that entity, the seisin, the tenant acts for the general owner, until the same actually passes to the latter on the termination of the estate of the former.[1] In one of the cases above supposed, the general owner having only parted with a term of years or a life-estate to A B, the balance of the fee remains in him, to which the law gives the name of a *reversion*.

In the other, when he parted with the life-estate or the term to A B, he, at the same time and by the same deed, parted with all besides that to C D, who thereby acquired what thus remained of the entire estate, except what was granted to A B; and to this the law gives the name of a *remainder*. This subdivision might be carried still farther, and with the same effect; as if, instead of an estate to A B for years or life, and then to C D in fee, it had been to A B for years or life, and then to J S for life or years, and then to C D in fee, limiting any number of remainders, one after the other, provided the last one only was a fee-simple; for when the fee-simple had been given to any one, there would be nothing further which the grantor could give.[2] And the remainder-man, in such case, takes by the deed, though a stranger thereto.[3] This may seem to be occupying too much space in illustrating what is, in fact, so simple a rule of law. But it is hoped that it will aid in defining a remainder, and simplifying what must necessarily at times become complex, and difficult of application.

6. A remainder, therefore, may be defined to be an estate or interest in lands or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate, which is created at the same time and by the same act * or instrument, and upon which such first- [*223] mentioned interest is made to depend.[4] But it is

[1] Wms. Real Prop. 206.

[2] Wms. Real Prop. 208; Fearne, Cont. Rem. 4, Butler's note.

[3] Phelps *v.* Phelps, 17 Md. 134.

[4] Co. Lit. 143 a; 2 Bl. Com. 163; Fearne, Cont. Rem. 3, and Butler's note; Id. 4; Brown *v.* Lawrence, 3 Cush. 390, 397; Booth *v.* Terrell, 16 Geo. 20; Leslie *v.* Marshall, 31 Barb. 564; Doe *v.* Considine, 6 Wall. 474.

essential to a remainder that there should be a prior estate actually created. Thus where one conveyed a freehold, reserving a prior life-estate to himself, he parted with nothing in the way of a particular estate; and therefore what he did grant was an estate after the expiration of his own, and not a remainder.[1] And it may be added, that a remainder-man always takes by *purchase*, and never by *descent*.[2] The court of Vermont, however, in treating of an interest of an heir in his ancestor's estate who shall die indebted, assuming that such interest is limited to what shall remain after paying the ancestor's debts, apply to it the term *remainder:* "a vested remainder is the strongest expression in their favor at all descriptive of their title."[3]

7. This prior estate is called the *particular* one, from *particula*, part or parcel, of which, with the remainder, the entire or whole estate is made up. It is this particular estate by which the possession, or the possession and seisin as the case may be, with which the grantor parts when he creates the limitation, are sustained until the remainder-man is ready to take; and if there is a break or interval of time between the one and the other, the second estate would be simply a future one, but not in any legal sense a remainder.[4] But the interests of the particular tenant and the remainder-man are so independent and distinct, that the former can make no claim upon the latter for improvements made by him upon the estate.[5] Nor can he make any agreement which will bind the estate of the remainder-man.[6] There can be no remainder where there can be no reversion. But the converse of the proposition is not strictly true. Thus, if a grant be made to A and his heirs so long as a certain tree stands, it constitutes a base or determinable fee, since it assumes that the estate, though a fee, may determine at some time. If it does determine, the estate will come back to him who created it, in the

[1] Bissell *v.* Grant, 35 Conn. 297.

[2] Dennett *v.* Dennett, 40 N. H. 504.

[3] Langdon *v.* Strong, 2 Vt. 254.

[4] Wms. Real Prop. 197; Burt. Real Prop. §§ 28, 29, 30; Prest. Est. 93; Wilkes *v.* Lion, 2 Cow. 333, 389; Watk. Conv. 174, 177, n. 174; 2 Flint, Real Prop. 258.

[5] Thurston *v.* Dickinson, 2 Rich. Eq. 317.

[6] Hill *v.* Roderick, 4 W. & S. 221.

nature of a reversion. But still it is not such an interest as is regarded by law as susceptible of being limited by way of a remainder, because the first estate limited was, in terms, a fee.[1] And it may be stated as a general proposition, that if a fee be given by way of a vested limitation, but a determinable one, and a remainder be limited after it, such remainder can only take effect as an executory devise.[2]

8. Another suggestion somewhat preliminary may be made, that, provided the estate be so limited that there is always some one *in esse* who holds the seisin, there is no violence done to the rules of the common law, whether the one who is to take the secondary estate is *in esse* or ascertained at the time of creating the estate, or becomes *in esse* or is ascertained afterwards, provided he be ready to take the seisin the instant the estate with the seisin in the first taker determines by its natural limitation. Thus, an estate might be to A for years or for life, with a *remainder to B in [*224] fee who is a known person *in esse*, or to A for life, remainder to the oldest son of B in fee, though B at the time of creating the estate had no son, and the remainder might be in suspense until B died or had a son. But, in the latter case, A's estate must obviously be a freehold, in order to his keeping the seisin, until there shall be a remainder-man ready and capable to take it; and this A cannot do if his interest is only a chattel one.

9. The first of these supposed cases presents what is known as a *vested* remainder. The latter exemplifies what are called *contingent* remainders. The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat.[3] In the

[1] 2 Flint, Real Prop. 265; 1 Eq. Cas. Abr. 186. The reader should bear in mind that the positions in the text relate to the common-law rules of property. The limitations of future estates by way of executory devises or springing uses remains to be considered. Buist *v.* Dawes, 4 Strobh. Eq. 37.

[2] Doe *v.* Selby, 2 B. & C. 930.

[3] Brown *v* Lawrence, 3 Cush. 390, 397; Leslie *v.* Marshall, 31 Barb. 564; Croxall *v.* Shererd, 5 Wall. U. S. 288.

second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect.[1] Among the definitions of a vested remainder is the following: "When a present interest passes to a certain and definite person to be enjoyed *in futuro*."[2] Preston says: "It is the present capacity of taking effect in possession, if the possession were fallen."[3] Among the illustrations of a vested remainder are the following: A grant to W. for life, and at her decease to be and become the property of her children and their legal representatives, is a present vested remainder in her children; and one of them having died in W.'s lifetime, his share went to his heirs.[4] So a devise to A for life, remainder to his children, and if either shall have died before A's death, leaving issue, such issue to take the parent's share, was held a vested remainder in the children.[5] In another case, a devise to A for life, and at her death to her oldest son, if she have one. She then had a son living, who was living at the testator's death; and it was held to be a vested remainder, since the contingency only related to a state of things existing at testator's death.[6] So where, by a marriage settlement, an estate was to C during her life, with a power of appointment, and then to the child or children of C in fee, but if C dies leaving issue, and such issue should die before attaining majority, then, from and after the decease of such issue, to, &c. C. died, leaving three children without having made an appointment, and two of them lived to be of age: it was held to be a vested remainder in the three as tenants in common.[7]

10. Whether vested or contingent, it is essential to a re-

[1] 2 Cruise, Dig. 204; Price *v.* Sisson, 13 N. J. 176; Hawley *v.* James, 5 Paige, Ch. 466; Williamson *v.* Field, 2 Sandf. Ch. 553; Moore *v.* Lyons, 25 Wend. 144; Leslie *v.* Marshall, 31 Barb. 564.

[2] Doe *v.* Considine, 6 Wall. 474–476.

[3] 1 Prest. Est. 70. See Moore *v.* Lyons, 25 Wend. 119; Blanchard *v.* Blanchard, 1 Allen, 227.

[4] Gourley *v.* Woodbury, 42 Vt. 395.

[5] Hill *v.* Baron, 106 Mass. 578.

[6] Gardiner *v.* Guild, 106 Mass. 25.

[7] Inches *v.* Hill, 106 Mass. 575.

mainder, for the reasons above stated, and is an imperative rule of law, that it should take effect immediately on the determination of the prior estate, the particular estate and remainder together forming one continuous ownership. Otherwise, instead of being an estate, it would be a mere contract for an estate to take effect at a future time; and if this was a freehold, it could not be created to commence in that manner.[1] Consequently, no remainder can be created without a particular estate to support it; and it must be so limited as to take effect immediately on the regular and natural determination of this prior estate, and not so as to abridge it.[2] And for *the reasons stated, this particular estate [*225] must, in case of a contingent remainder, be one of freehold.[3] Though at common law, if this particular estate was by any means defeated, or had expired before the contingent remainder vested, the latter must have failed altogether, this is now corrected by statute in England, and in most if not all the United States, though this does not affect the manner of creating this class of remainders originally.[4]

11. From the doctrine above stated, that the particular estate and remainder form together when united but one estate of the extent or duration of the two, it follows, that, while ever so many remainders in succession may be carved out of a fee-simple if each is less than a fee, no remainder can be limited after a fee; for when a fee has once been created, there can be nothing left by way of remainder to give away. Nor does it make any difference that this fee is a qualified one; for so long as it exists it is deemed to be indefinite in its duration, and no remainder can be expectant upon it.[5] It has accordingly been held, that, if an estate is given to one with a full and absolute power of control and disposal, there can properly be no remainder limited after his estate, though this

[1] 1 Prest. Est. 93; 2 Flint, Real Prop. 263; Doe *v.* Considine, 6 Wall. 474.

[2] 1 Prest. Est. 91.

[3] Watk. Conv. 175, n. 181; Wms. Real Prop. 224; Doe *v.* Considine, *sup.*

[4] Stat. 8 and 9 Vict. c. 106, § 8; Wms. Real Prop. 233, Rawle's note. See *post*, sect. 7, pl. 4.

[5] Wimple *v.* Fonda, 2 Johns. 288; Co. Lit. 18 a, 143 a; 2 Flint, Real Prop. 257; Willion *v.* Berkley, Plowd. 235; Seymor's case, 10 Rep. 97; Fearne, Cont. Rem. 308.

was in terms a contingent one. Thus, where the devise was to A and his heirs, and if he should die and leave no heirs, what estate he should leave was devised to J. S., it was held that the devise to J. S. was void, from the implied power of disposal of the estate given to the first devisee.[1] Though a similar devise in England has been held good as an executory devise to J. S.; as where the estate was to A and his heirs, but if he died without leaving issue, "and he shall not have disposed or parted with" the estate, then over, it was held to be subject to A's disposal by deed during his life, but not after his death by will; and he having failed to convey it by deed, the devise over was held to be good.[2] It was early decided, that upon a devise to A and his heirs, so long as J. S. had issue, and, after the death of J. S. without issue, remainder over to another, the devise of the remainder was void, as the first taker had a fee.[3]

[*226] *12. It may be well in this connection to explain the distinction there is between a remainder and a contingent or conditional limitation, which, by the way, was unknown to the common law, as there exists between the two, especially where the remainder is a contingent one, a similarity which might mislead a casual examiner. A remainder, it will be remembered, is an estate so limited as to come into effect and enjoyment at the natural expiration of a prior estate, less than a fee. But it is competent to create by devise an estate in one and his heirs, and yet so limit it, that, upon the happening of some condition or contingent event, his estate shall cease, and go over to another. Now, the first cannot be a *particular* estate, for it is in its terms a fee; and if the condition or event do not happen, it will for ever remain a fee. The second cannot be a remainder, because it is to take effect, not at the natural determination of the first, for, that being a fee, such a determination could never happen; but it comes in and destroys or defeats the first estate before its natural expi-

[1] Ide *v.* Ide, 5 Mass. 500; Jackson *v.* De Lancy, 13 Johns. 557; Attorney-General *v.* Hall, Fitzg. 314; McLean *v.* Macdonald, 2 Barb. 534; *post*, *374.

[2] Doe *v.* Glover, 1 C. B. 448. See Andrews *v.* Roye, 12 Rich. 544.

[3] 1 Eq. Cas. Abr. 185. See also 2 Cruise, Dig. 203; Bowman *v.* Lobe, 14 Rich. Eq. 271.

ration, and becomes substituted in the place of the other. Nor is there a conditional estate at common law in the first taker; for if there was, no one but the heirs or devisees of the devisor could take advantage of it, and then only by regaining the original estate by entry, which would not go over to the second devisee named, but remain in the original owner or his heirs. The courts therefore hold, that, though an estate thus limited cannot take effect as a remainder, it shall be held by the first taker as a conditional limitation; that is, his estate, though nominally a fee, is limited in its duration by the happening of the condition or contingent event; that as soon as that happens, if at all, his estate ceases, and then the residue of the fee passes like a remainder over to the devisee, who, by the devise, is to take upon the happening of such event. This, however, is rather by way of explaining, for the present, wherein such a limitation differs from a remainder, than to enter into any detail of the rules of law applicable to conditional limitations.[1] And it may be remarked, though hereafter to be repeated, that a limitation is never construed as an executory devise, when it is capable of taking effect as a remainder; nor is a remainder ever deemed to be a contingent one, when it can be construed to be vested, within the intention of the one who creates it.[2] And it may be added, that the law holds that estates vest at the earliest possible period, unless there is a clear manifestation of an intention on the part of the testator to the contrary.[3] A remainder to an unborn child becomes vested while he is *en ventre sa mère*.[4] Another case illustrative of the principle above stated was this: There was a devise to A for life, remainder to his children then living, and the lawful issue of such as had deceased, their heirs and assigns. For want of

[1] Fearne, Cont. Rem. 3, 407, and Butler's note, 10; Watk. Conv. 179, Coventry's note, 204; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 149; Watk. Descent, 2d ed. 248; 2 Cruise, Dig. 238; 1 Prest. Est. 91; Cogan *v.* Cogan, Cro. Eliz. 360; Pells *v.* Brown, Cro. Jac. 590; 2 Fearne, Cont. Rem. Smith's ed. §§ 158–160. See *post*, § 7, pl. 2; Horton *v.* Sledge, 29 Ala. 495, 496.

[2] Blanchard *v.* Blanchard, 1 Allen, 225; Johnson *v.* Valentine, 4 Sandf. 36; Manderson *v.* Lukens, 23 Penn. St. 31; Doe *v.* Selby, 2 B. & C. 930; Leslie *v.* Marshall, 31 Barb. 566; *post*, p. *251.

[3] Doe *v.* Considine, 6 Wall. 475.

[4] Crisfield *v.* Storr, 36 Md. 129.

such children, there was a devise over to the right heirs of the testator. A died unmarried; and the question was as to the time to which reference was to be had in determining who were to take as heirs of the testator, — his death, or the death of A; and it was held to be those who were his heirs at his death. It was held to be a contingent remainder, with a double aspect, to A's children in fee if he had any; if he had none, to whoever were testator's heirs at his death, unless otherwise clearly expressed.[1] The following case may perhaps illustrate the difficulty there sometimes is in determining whether a given limitation of a future estate is a remainder or not. T. G. by will gave to his son S. H. G. the use of an estate, "also to his lawful children; and in case of his death without children, then to be equally divided between his five daughters," "and their heirs for ever." The wife of S. H. G. was *enceinte* when the testator died, but had no children then born. She subsequently had four who were living at the death of S. H. G. Ritchie, C. J., in an able and elaborate opinion, reversed that of the Master of the Rolls, who held the devise to be to S. H. G. or his children in fee, and held it to be a life-estate in S. H. G., with a remainder to his children. In either case, the daughters would have taken by way of executory devise had S. H. G. died without children. And the first devise being to S. H. G., "*also* to his lawful children," might readily have led any one to the same conclusion with the Master of the Rolls; and the C. J. remarks, in giving his opinion, "The case is by no means free from difficulties."[2]

[*227] *13. The effect of the foregoing doctrine would be, that, had estates-tail remained as they were at common law, there could never be a remainder limited upon the failure of issue in the tenant in tail. Such estates were deemed conditional fees, determinable only upon the donee's dying without issue. But since the statute *de donis* turned the estate of the tenant in tail theoretically into an estate for life, which is certain to have a natural termination at his death, it is entirely compatible with the rules of law to limit a remainder

[1] Buzby's Appeal, 61 Penn. St. 111, 117; Abbott *v.* Bradstreet, 3 Allen, 587.
[2] Gourley *v.* Gilbert, 1 Hannay (N. B.), 80.

after his death, to take effect if he dies without issue. And the English cases to this effect will be found to be very numerous and common.[1]

14. The term Remainder, it should be observed, is not one of art, which it is necessary to employ in creating an estate in expectancy, such as has been described. Any form of expression indicating the intention of the grantor or devisor to do this would be sufficient.[2]

15. It should be remembered, too, that no degree of uncertainty as to the remainder-man's ever enjoying the estate which is limited to him by way of remainder will render such remainder a contingent one, provided he has, by such limitation, a present absolute right to have the estate the instant the prior estate shall determine. Thus if, for illustration, an estate is given to A for years, remainder to B for years or life, remainder to C for life, each of these persons being alive and having a perfect right to the land in the order named, B or C, for instance, being only postponed in the enjoyment of his estate till the preceding tenant's term or life shall end, they have each of them a vested remainder. And yet C may die before B's estate, or B before A's estate, shall be determined, so that neither may ever, in fact, enjoy any benefit or estate whatever in the * land.[3] On the [*228] other hand, had the estate to C been in fee instead of for life, though he might not have lived to enjoy it, it would descend to his heirs, who would take in his place; or, whether in fee or for a less estate, he might have conveyed it in his lifetime by deed, and his grantees would take the same rights in respect to it that he himself possessed.[4]

16. An estate is accordingly said to be vested in one in possession when there exists in his favor a right of present enjoyment. It is vested in interest when there is a present

[1] Willion *v.* Berkley, Plowd. 235; Wilkes *v.* Lion, 2 Cow. 333, 392; Hall *v.* Priest, 6 Gray, 18.

[2] 2 Cruise, Dig. 203.

[3] Parkhurst *v.* Smith, Willes, 338; Watk. Conv. 173, Coventry's note; 2 Flint, Real Prop. 267; Wms. Real Prop. 207; Fearne, Cont. Rem. 216; Williamson *v.* Field, 2 Sandf. Ch. 533; Manderson *v.* Lukens, 23 Penn. St. 31.

[4] Wms. Real Prop. 207; 2 Cruise, Dig. 203, n.

fixed right of future enjoyment.[1] Thus a devise to A for life, remainder to B in fee at his death, would be a vested remainder, if B is *in esse;* and if he die before A, the estate, at A's death, would go to his heirs.[2] In this sense, therefore, a vested remainder is, to all intents, an estate commencing *in præsenti*, though to be enjoyed *in futuro*.[3]

17. "The present *capacity* of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."[4] By *capacity*, as thus applied, is not meant simply that there is a person *in esse* interested in the estate, who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A for life, remainder to B, B has a capacity to take this at any moment when A may die. But if it had been to A for life, remainder to B after the death of J. S., and J. S. is still alive, B can have no capacity to take till J. S. dies. When J. S. dies, if A is still living, the remainder becomes vested, but not before. And as the [*229] common law stood, if A died in the life of *J. S., the remainder in B would fail, although he was then alive.[5] *

* Note. — In view of the prevalent disposition of the courts to hold remainders vested, rather than contingent, upon grounds of general policy, it may seem somewhat remarkable that the courts of New Hampshire have recently adopted a principle of contingency in respect to remainders which does not appear to have been heretofore recognized in other quarters, or, even to a casual observer, to find support in the authority on which the doctrine is said to rest. The principle is this, that where an estate is limited to one for life, or during

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[1] Watk. Conv. 173, Coventry's note; 4 Kent, Com. 202; Fearne, Cont. Rem. 2; Marshall *v.* King, 24 Miss. 90.

[2] Allen *v.* Mayfield, 20 Ind. 293.

[3] 2 Flint, Real Prop. 259; Pearce *v.* Savage, 45 Me. 101.

[4] Fearne, Cont. Rem. 216; Co. Lit. 265, note 213. See 2 Greenl. Cruise, Dig. 210, n.; Brown *v.* Lawrence, 3 Cush. 390, 397; Croxall *v.* Shererd, 5 Wall. U. S. 288.

[5] 1 Prest. Est. 70; Co. Lit. 265, note 213; 2 Cruise, Dig. 210; 2 Crabb, Real Prop. 966.

18. From the fact that, while a remainder is contingent by reason of the person who is to take it not being ascertained,

his natural life, and after his decease to another, though an ascertained person then in being, there is such a possibility of the first taker committing a forfeiture of his estate, or surrendering it, or its merging in the inheritance during his life, that the remainder over is a contingent, and not a vested, one. And this, too, while so many of the States are discarding the doctrine of contingent remainders being affected by defeating the particular estates on which they rest. In the case referred to, of Hall *v.* Nute, 38 N. H. 422, approved of as settled law in Hayes *v.* Tabor, 41 N. H. 521, the facts were these : A testator devised lands to Esther Tuttle, " to hold as long as she lives a natural life ; also the land which I have given to Esther Tuttle as long as she lives, after her decease I give and bequeath the same to my son, William Tuttle, as long as he lives a natural life, and no longer; and after his decease, I give and bequeath the same to his heirs and assigns." These being the terms of the devise, the opinion of the court is given, that no injustice may be done to the reasoning or conclusions upon these premises : " Was the remainder limited to William Tuttle vested or contingent ? The land is devised to Esther Tuttle, as long as she lives ; and after her decease to William Tuttle, as long as he lives a natural life, and no longer ; and after his decease, to his heirs. William Tuttle, under this devise, could not take the estate limited to him in remainder until the death of Esther Tuttle. If her estate were destroyed during life, by forfeiture, or by surrender and merger in the inheritance, the remainder limited to William Tuttle could never vest in possession, though he might survive his mother, because there would be no particular estate to support the remainder. If the remainder had been limited on the life-estate of Esther Tuttle, then, whenever that estate determined, whether by her death or otherwise, William Tuttle, while he lived, would have been an ascertained person qualified to take, and the remainder would have been a vested and not a contingent remainder. But this remainder is not limited to take effect on the determination of Esther Tuttle's estate for life, but can only take effect on and after her death ; and this makes the remainder contingent." This doctrine is further carried out in the case ; and W. T. having by deed released his interest in the land to E. T., it was held to convey nothing, and did not estop him from claiming the land after C. T.'s death. " A vested remainder may be conveyed by deed operating on the estate at the time when the deed is made, but not a contingent remainder."

Chancellor Kent, on the other hand, in illustrating by example what would be a *vested* remainder, says : " A grant of an estate to A for life, with remainder in fee to B, or to A for life, and after his death to B in fee, is a grant of a fixed right of immediate enjoyment in A, and a fixed right of future enjoyment in B." (4 Kent, Com. 202.) So Mr. Butler, in his note to Fearne on Remainders (p. 2), says : " If A convey or devise to C for life, and after C's decease to B and his heirs, B's estate is vested in him in interest." In a case reported in 40 Barb. 89, Carter *v.* Hunt, the devise was as follows : " I give and devise to J. M. the house and lot I now occupy, to be used and enjoyed by him during the term of his natural life ; and from and immediately after his decease, I give and devise the same to S., the daughter of J. M., her heirs and assigns for ever." And it was held, that S. took a *vested* remainder in fee. Nor is it easy to see how

it is not capable of alienation, as well as because, at common law, it was always possible to defeat such a remainder by destroying the particular estate before the remainder vested, courts have always been inclined to construe the limitation of a remainder as a vested one, wherever the terms in which it is created will admit of such construction.[1] Thus, upon a devise to A for life, remainder to the surviving children of J. S., it is obvious that, in terms, it is equivocal whether the *surviving* relates to the death of the testator or of A. If to the latter, the remainder must be a contingent, since no one can tell who will be such survivors until the death of A. Whereas, if the term relate to the testator's death, and J. S. then have children, the remainder is a vested one, since there is then an ascertained person *in esse*, capable of taking the estate *in præsenti* at any moment. And accordingly courts construe an estate thus limited to be a vested remainder.[2] Another

the doctrine of Hall *v.* Nute finds support from that of Doe *v.* Holme, 2 W. Bl. 777, on which it is said by the court to rest. In that case the devise was "to J. S. for the term of his natural life, and after his decease to the heirs male and female of J. L." The court, of course, held this a contingent remainder, but not because J. L. might forfeit or surrender or merge his particular estate, but simply because, there being no heir of J. L. capable of being ascertained so long as J. L. lived, it could not be otherwise than contingent. Besides, the cases are too numerous and familiar to multiply them by way of citation, that "it is the uncertainty of the *right* of enjoyment which renders a remainder contingent, not the uncertainty of its *actual* enjoyment." Price *v.* Sisson, 13 N. J. 168, 176; Williamson *v.* Field, 2 Sandf. Ch. 533; Moore *v.* Lyons, 25 Wend. 144; *ante*, pp. *227, *228. Nor does the court state how, if the limitation be in terms a vested remainder, the owner of the particular estate claiming under the same devise that creates the remainder can "surrender" and merge it in the inheritance, so as thereby to change what would otherwise be a vested remainder into a contingent one. An equally remarkable decision was made in New York, Moore *v.* Littel, 41 N. Y. 66, and reaffirmed in House *v.* Jackson, 50 N. Y. 165, though of an opposite character to that in New Hampshire, where it was held that a grant to A for life, remainder to his heirs, was a vested remainder. Three, however, of the court held, what is regarded by most other courts as law, that it was a contingent one.

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[1] Dingley *v.* Dingley, 5 Mass. 535, 537; Doe *v.* Perryn, 3 T. R. 484; Doe *v.* Prigg, 8 B. & C. 231; Doe *v.* Provoost, 4 Johns. 61; Moore *v.* Lyons, 25 Wend. 119; Boraston's case, 3 Rep. 20; Duffield *v.* Duffield, 1 Dow & C. 311; Tud. Lead. Cas. 680; *ante*, p. *226, *post*, p. *251; Den *v.* Demarest, 1 N. J. 525; Fay *v.* Sylvester, 2 Gray, 171; Croxall *v.* Shererd, 5 Wall. U. S. 287.

[2] Doe *v.* Prigg, 8 B. & C. 231; Moore *v.* Lyons, 25 Wend. 119; Chew's Ap-

illustration of this proposition is found in a recent case, where the devise was to A for life, with a devise over of all the property, real and personal, which might be left at A's death to the testator's four children, by name, with a provision, that, if any of the four children died before A, the property should be equally divided among the survivors, "except they should leave issue," and in that case to go to the issue. It was held to be a vested remainder in the four children. If it had been construed to be a devise to such of them as survived A, it would have been a contingent remainder. It was held, moreover, to be a devise in fee, subject to be divested upon the happening of a condition subsequent, with a limitation over upon the happening of that contingency, which latter limitation was by way of executory devise.[1] But where the devise was in these words, "Should my wife marry or die, the land then shall be divided among my surviving sons," the moment of survivorship was held to be fixed at the death or marriage of the wife; and, of course, until that happened, it was contingent who the persons were to be who could take as "surviving sons."[2] It was accordingly held that a limitation to a wife, with a remainder to her children surviving, was a contingent remainder to the children.[3] On the other hand, where the devise was to A until B arrived at the age of twenty-one years, and then to B in fee, it was held to be an absolute devise of the estate to B, but postponing the enjoyment of it to his arriving at age. And being vested in
*him, if he were to die before that time it would [*230]
descend to his heirs.[4] A devise to trustees to hold
for a daughter during her life, and, at her death, to convey the estate to her children, was held to create a vested remain-

peal, 37 Penn. St. 23; Eldridge *v.* Eldridge, 9 Cush. 516; Manderson *v.* Lukens, 23 Penn. St. 31; Mason *v.* Lyon, 25 Wend. 119.

[1] Blanchard *v.* Blanchard, 1 Allen, 226. See Smither *v.* Willock, 9 Ves. 233; Doe *v.* Nowell, 1 M. & S. 327; Bentley *v.* Long, 1 Strobh. Eq. 43; Phillips *v.* Phillips, 19 Geo. 261; Johnson *v.* Valentine, 4 Sandf. 36; Yeaton *v.* Roberts, 8 Foster, 465; Ross *v.* Drake, 37 Penn. St. 373; Abbott *v.* Bradstreet, 3 Allen, 589.

[2] Olney *v.* Hull, 21 Pick. 311. [3] In Matter of Ryder, 11 Paige, 185.

[4] Doe *v.* Underdown, Willes, 293; Young *v.* Stoner, 37 Penn. St. 105; Danforth *v.* Talbot, 7 B. Mon. 623.

der, the enjoyment of the estate being postponed to the death of the daughter.[1]

19. There is, however, a class of cases where a remainder is regarded as vested, although all the persons who may take are not ascertained or *in esse*, and cannot be until the happening of some future event. And that is where there is a devise of a remainder to a class of which each member is equally the object of the testator's bounty, as to " the children " of a person, some of whom are living at the testator's death. As, for instance, upon a devise to A for life, remainder to the children of J. S., if J. S. has children at the testator's death they would take a vested remainder; and if he were to have other children during the life of A, and *before the remainder was to take effect in possession*, it would open and let in the children born during A's life, who would take shares as vested remainders.[2] And a like rule was applied in a case where a conveyance was made to a mother and her children and *their* heirs. It was held to let in after-born children, on the ground that it was a life-estate in the mother, with a remainder to her children. Though it might well be questioned whether the doctrine applies where there are persons *in esse* to take, and nothing in the deed indicates an intent to make provision for others not *in esse*, or to postpone its vesting.[3] The above distinction is illustrated in the case cited below, where the grant was to A for life, and, at her death, to her children, where the grantor obviously referred to the death of the first taker as the time when the persons who should take the remainder should be ascertained; and it was accordingly held, that it opened and let in after-born children. And so imperative was this rule regarded, that, when the guardian of the

[1] Darling *v.* Blanchard, 109 Mass. 176.

[2] Doe *v.* Prigg, 8 B. & C. 231; Doe *v.* Provoost, 4 Johns. 61; Ballard *v.* Ballard, 18 Pick. 41; Viner *v.* Francis, 2 Cox, 190 and notes; Tud. Lead. Cas. 644, 652; 2 Brown, Ch. 658; Swinton *v.* Legare, 2 M'Cord, Ch. 440; Myers *v.* Myers, 2 M'Cord, Ch. 257; Jenkins *v.* Freyer, 4 Paige, Ch. 47; 2 Jarm. Wills, 75; Dingley *v.* Dingley, 5 Mass. 535; Wight *v.* Shaw, 5 Cush. 56, 60; Parker *v.* Converse, 5 Gray, 338, 339; Yeaton *v.* Roberts, 8 Foster (N. H.), 466; Carroll *v.* Hancock, 3 Jones (Law), 471; Doe *v.* Considine, 6 Wall. 475; Worcester *v.* Worcester, 101 Mass. 132, where the time of vesting was limited to a year; that is, in such children as should be born within a year after testator's death.

[3] Coursey *v.* Davis, 46 Penn. 25.

children then alive sold the remainder by license of court, it was held not to affect the title to their shares in the after-born children.[1]

20. One property of a vested remainder is, that it may be aliened by any form known to the law which does not require a formal livery of seisin, or passing the actual possession. But there is the same restriction as to conveying a freehold to commence *in futuro*, when applied to remainders, as applies to other estates.[2] Such remainder may be devised, assigned, or limited over, and made subject to contingencies and trusts, at the will of him in whom it is vested;[3] and, though only a right of a future enjoyment, it is an estate *in præsenti*.[4]

21. The particular estate and remainder must, as heretofore defined, constitute a continuous ownership in succession, and be parts of the same inheritance; they must commence and pass out of the grantor by the same act and at the same time; and if for any cause the particular estate is void or is defeated *ab initio*, as by the entry of the grantor for the breach of some condition, it leaves the remainder without support, and *this becomes a mere estate to commence [*231] *in futuro*, which, if a freehold, fails altogether.[5]

The foregoing proposition may be in part illustrated thus: An heir assigns to his mother, widow of the ancestor from whom he claims by descent, a part of the estate as dower, and at the same time grants the dower-land from and after her death to A B. This limitation would be void as a remainder, since the widow does not take her title derivatively through the heir and as a part of his estate, but under and by a title independent of his; so that, instead of the grant to A B being a remainder, it is simply a grant of a freehold, to commence when the widow's estate shall determine at her death.[6] For this reason, the particular estate that supports the remainder

[1] Adams *v.* Ross, 1 Vroom, 513; Graham *v.* Houghtaling, 1 Vroom, 558.

[2] Watk. Conv. 182, and Coventry's note; 1 Prest. Est. 75; Blanchard *v.* Brooks, 12 Pick. 47, 65. This latter restriction would not apply where, as in Ohio, one may by statute convey an estate in freehold to commence in *futuro*. Walk. Am. Law, 286; Pearce *v.* Savage, 45 Me. 101.

[3] Glidden *v.* Blodgett, 38 N. H. 74. [4] Jackson *v.* Sublett, 10 B. Mon. 467.

[5] Colthirst *v.* Bejushin, Plowd. 25; 2 Flint, Real Prop. 260; 2 Bl. Com. 166.

[6] Colthirst *v.* Bejushin, Plowd. 25; Park, Dower, § 341; *ante*, vol. 1, p. *254.

must be something more than an estate or tenancy at will, for such an interest is not deemed to be a part of the inheritance.[1] One reason why, where there is a freehold in remainder depending upon a particular estate for years, the livery of seisin must be made to such termor for years, is that it may pass from the grantor, and the remainder-man need not be obliged, in order to avail himself of his estate in the premises, to interfere with the immediate possession of the same, which is exclusively in the termor.[2]

22. The remainder-man must accordingly wait until the particular estate has regularly determined, and can do nothing to abridge it; and if, as already stated, before that time it is defeated altogether, as by an entry by the grantor for condition broken before the remainder-man comes into possession, the estate of the latter fails altogether.[3] But where there was a devise to A for life, remainder to B, and A declined to accept the devise, it was held that B took the estate on the death of the testator without waiting for the death of A.[4] But where one gave an estate to his wife for life, with a provision that if she married she should forfeit certain parts of it, with remainder to such of the testator's brother's children as should be alive at her death, and she did marry, it was held that the part thus forfeited and lost by her went to testator's heirs at law, to hold until her decease; as, by the express terms of his will, that was the time at which the devise as to the remainder was to take effect.[5]

23. There is no relation of tenure between a remainder-man and the tenant of the particular estate, since they [*232] both * derive their interests or estates from the same source, and not one from the other.[6] A remainder-man may, therefore, have a separate action against a stranger for an injury to the inheritance; and for the injury to the immediate enjoyment of the estate, the tenant for life may

[1] 2 Flint, Real Prop. 259; 2 Bl. Com. 166; *ante*, vol. 1, p. *371.

[2] Lit. § 60; Co. Lit. 49 a; 2 Flint, Real Prop. 262.

[3] 2 Flint, Real Prop. 263. This proposition applies to the common law. How it may be done by executory devises, or springing and shifting uses, will be shown hereafter. See also *post*, § 7, pl. 2.

[4] Yeaton *v.* Roberts, 8 Foster, 459.

[5] Augustus *v.* Seabolt, 3 Met. (Ky.) 161.

[6] Wms. Real Prop. 205.

have his own appropriate action.[1] Nor is the possession of the tenant for life adverse to the remainder-man, so as to affect the right of the latter to make a valid conveyance.[2]

24. In order that successive estates in the same land should constitute remainders in respect to each other, they must be so limited as to come into possession successively one after the other in some prescribed order, the owner of the one waiting to enter until the estate of the other shall have been determined.[3] But it is unimportant what this order is, provided that a fee other than a fee-tail does not precede another of the estates limited. Thus the limitation may be to A in tail, remainder to B for life, and to C for years, with a remainder to D in fee. If by death or forfeiture any previous estate fails, the one to whom the next in order is limited will at once come in, and have a right to immediate possession. So that, no matter how numerous these limitations may be, as each is ready thus to come into possession at any moment, they are all regarded as having a vested remainder,[4] because, in the case supposed, the successive limitations are to persons *in esse;* and the same rule as to the order of succession would apply, though the remainders were what is called *contingent.*

25. There are one or two exceptions to the rule, that, if the original seisin of the particular estate on which the remainder depends be defeated and avoided, the remainder itself will fail, which apply as well to vested as to contingent remainders, and may be properly noticed here. Thus, for instance, if a lessor were to make a lease for life, and then disseise his own lessee, and make a second lease to another during the life of his first lessee, with a remainder over to a third person in fee, though the first lessee, by an entry, would defeat the seisin of the second lessee, yet the lessor would not be at liberty so far to take advantage of his own wrong as to avail himself of this circumstance in defeating the remainder in fee which he had himself created, though the livery which sustained it was a wrongful one as against his first lessee. So if the particular estate be to A, an infant, for life, remainder to B in fee, and A, when he * comes of age, [*233]

[1] Van Deusen *v.* Young, 29 N. Y. 9.
[2] Grout *v.* Townsend, 2 Hill, 554.
[3] Wms. Real Prop. 206.
[4] Wms. Real Prop. 207.

disaffirms the estate in himself, it will not defeat the remainder which had become once vested by a good title.[1]

26. Whatever may be the distinction between vested and contingent remainders, so long as they remain such, the moment the contingency happens on which a remainder depends it becomes a vested one, with the qualities and incidents of such a remainder. Thus, upon the grant of an estate to A, with a remainder to his children, he having none at the time, the remainder will, of course, be a contingent one; but the moment he has a child born, the remainder becomes vested as fully as if it had originally been limited to a living child.[2] But if there be an interval, however brief, between the determination of the particular estate and the vesting of the remainder, the latter is for ever defeated and gone, and the entire estate reverts at once to the donor or grantor who created it.[3]

SECTION II.

OF CROSS-REMAINDERS.

1. Cross-remainders defined.
2. Purposes answered by such remainders.
3. Cross-remainders, how created.
4. Final limitation must be in entirety.
5. How far remainders affected by the rule as to perpetuities.

1. THERE is a class of remainders known to the law as Cross-Remainders, to each of which the same rules apply as if they were independent of each other, although there may be a common ownership of the two or more estates out of which they are created. Cross-remainders arise where lands are given in undivided shares to two or more persons by the way of particular estates, by such limitations, that, upon the determination of the estate of the first taker in any one of the shares, it remains over to the other grantees or donees named, and the reversioner or ulterior remainder-man is not let into

[1] Co. Lit. 298 a.
[2] Doe *v.* Perryn, 3 T. R. 484; Wendell *v.* Crandall, 1 Comst. 491.
[3] 1 Prest. Est. 217; Wms. Real Prop. 226.

possession till the determination of all the particular estates.[1] But though usual, * it is not necessary, in or- [*234] der to create cross-remainders, that the estates should originally have been granted to the several persons in common. The term seems equally applicable to two distinct estates, where one is granted to A and the other to B, with remainder over of A's estate to B on failure of issue of A, and of B's estate to A on a like failure of issue.[2]

2. The obvious design and intention of such a limitation is, that upon the share of one of the takers failing for want of issue, instead of its reverting to the original owner, or going at once to the final remainder-man, it shall go to the tenant or tenants of the other parts of the estate, who will hold it in connection with the parts already in their possession as they before had holden their own parts. And as this is a reciprocal right, operating crosswise, and only depending upon whose part first fails by a failure of issue, the right to take such part upon such a failure is regarded as a remainder, and is treated accordingly.

3. Such remainders may be limited by deed or by will, and may exist between two or a greater number of persons. They may be raised by express terms, or in a will by implication. But a cross-remainder is never raised by deed without express terms, and proper words of limitations.[3]

4. In limiting such interest by the way of cross-remainders, the limitation should be so expressed as to pass not only the original share of the party, but whatever share or shares shall accrue to him or his issue upon the decease and failure of issue of the others named.[4] Therefore, where a devise was

[1] Co. Lit. 195 b, Butler's n. 1; 4 Cruise, Dig. 298; 2 Crabb, Real Prop. 972; 1 Wms. Saund. 185, note; 1 Prest. Est. 94; Walk. Conv. 189, Coventry's note.

[2] 1 Prest. Est. 94; 4 Kent, Com. 201.

[3] Watson *v.* Foxon, 2 East, 36; Watk. Conv. 9, Coventry's note; Co. Lit. 195, note 82; Cook *v.* Gerrard, 1 Wms. Saund. 186, n.; Doe *v.* Worsley, 1 East, 416. It has been questioned whether there can be cross-remainders to more than two. The subject is discussed by Dodridge, J., in Gilbert *v.* Witty, Cro. Jac. 656, against the position. See also Twisden *v.* Lock, Amb. 665; Wright *v.* Holford, Cowp. 31; Phipard *v.* Mansfield, Ib. 799. Whether they may be created by deed? Cole *v.* Levingston, 1 Vent. 224. And see Hall *v.* Priest, where cross-remainders were sustained between eight persons, 6 Gray, 18.

[4] Co. Lit. 195 b, note 82.

to several in fee, in common, with a devise over in case all should die under age, and one of them died in infancy, it was held that his share went to his heir, subject only to be defeated if and when all these devisees should die under age.[1] The test in all these cases of the existence of a cross-remainder is, whether, if by deed there is an express limitation, or if by will an express or implied one, that the whole of the estate shall go over, together, in entirety to its final limitation, upon the failure of issue, or in parts as the issue of one or another of the first takers shall fail.[2]

[*235] * 5. A principle may be referred to in this connection, for the purpose of making a necessary distinction in respect to expectant estates. An executory devise, in order to be valid, must be so limited that it must take effect, if at all, within a life or lives in being, and twenty-one years and a fraction after, in order to avoid what are called perpetuities in estates. But this does not apply to remainders whether contingent or vested; and one reason is, that, if the remainder be limited upon an estate-tail, the tenant in tail can, at common law, bar the remainder by barring the entail.[3] The language of Lord St. Leonards on this subject is: "Where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vests in possession, because the previous estate may subsist for centuries or for all time; or it is a contingent remainder, and then by a rule of law, unless the event upon which the contingency depends happen so that the remainder may vest *eo instanti*, the preceding limitation determines; it can never take effect at all."[4] It ought to be stated, however, that the court in the case cited below are inclined to question the correctness of the rule as here stated, on the ground that under it there might be an unlimited succession of contingent particular estates, which would take effect so long as the persons who

[1] Fenby *v.* Johnson, 21 Md. 117; 2 Jarm. Wills, 482.

[2] Doe *v.* Webb, 1 Taunt. 233.

[3] Watk. Conv. 193, 194, Coventry's notes; Nicolls *v.* Sheffield, 2 Brown, Ch. 215.

[4] Cole *v.* Sewell, 4 Dru. & Warr. 28.

were to take came into being during the continuance of a prior estate, so as to take it at the expiration of such prior estate. And that the law will not allow this, they cite a case from East.[1]

SECTION III.

OF CONTINGENT REMAINDERS.

1. Contingent remainders defined.
2. Their history.
3. Instances of such remainders.
4. How far contingent remainders are alienable.
5. Of the different classes of contingent remainders.
6. Cases embraced in the first class.
7. Cases embraced in the second class.
8. Third class of contingent remainders.
9. Fourth class of contingent remainders.
10. Of exceptions to the third rule or class.
11. How remainders of terms for years may be limited.
12. Of exceptions to the fourth rule or class.
13. No contingency of enjoyment makes a remainder contingent.
14. Of vested, limited after contingent remainders.
15. Case of Napper *v.* Sanders.
16. Case of Tracy *v.* Lethieullier.
17. Of remainders affected by the contingency of prior remainders
18. What constitute the first class of these remainders.
19. How far affected by intention.
20. The second class of successive remainders.
21. The third class of such remainders.
22. How far contingency affects successive estates depends on intention.
23. Of limitations of a fee with a double aspect.
24. Remainder after a contingent remainder must be contingent.
25. Remainders may be good after trust-estates, though in fee.
26. Of effect upon remainders of powers of appointment.
27. Boraston's case; future devise whether vested or conditional.
28. Of contingencies having the effect of conditions subsequent

1. Repeating, by way of definition, what has already been stated in substance, a contingent remainder is one whose vesting or taking effect in interest is, by the terms of its creation, made to depend upon some contingency which may never

[1] Wood *v.* Griffin, 46 N. H. 235; Seaward *v.* Willock, 5 East, 206.

happen at all, or may not happen within a requisite prescribed time, by reason whereof its capacity of vesting or taking effect in interest may be for ever defeated.[1] Or, in the language of another, it is one "which is limited to a person who is not ascertained at the time of the limitation, or which is [*236] referred for its * vesting or taking effect in interest to an event which may not happen till after the determination of the particular estate,"[2] or upon the happening of some uncertain and doubtful event, or where the person to whom it is limited is not ascertained or yet in being. Thus an estate to a widow for life, to be forfeited if she married, with remainder to a brother's children living at her death, was a contingent remainder; and if she were to marry, the estate would pass to the heirs of the devisor until her death. The court call such estate a contingent remainder; but it might be questioned whether it is not more properly an executory devise.[3] Until the contingency has happened, the remainder is rather a *possibility* in its character than an *estate;* although it has become a familiar *quality of an estate*, to understand and apply which involves much nice learning.[4] It is always an executory interest from its very nature.[5]

2. In tracing the history of contingent remainders, it appears that down to the time of Henry VI., A. D. 1431, they were not accounted legal estates; nor is there a case previous to that time where such a remainder was held to be valid.[6] The first case in which they were recognized by law was in 9 Henry VI., where the grant was in form to A for life, remainder to the heirs of J. S. This could not come under the rule in Shelley's case, for J. S. took nothing himself. It was held to be an estate in the heirs of J. S., but necessarily suspended till his death should determine who were to take as such

[1] 1 Prest. Est. 74; 2 Bl. Com. 169.

[2] 1 Law. Mag. 120; Brown *v.* Lawrence, 3 Cush. 390, 397; Fearne, Cont. Rem. 2. The New York statute defines a remainder as contingent, "whilst the person to whom or the event upon which they are limited to take effect remains uncertain." Rev. Stat. 1827, tit. 2, art. 1, § 13; Lalor, Real Prop. 66.

[3] Augustus *v.* Seabolt, 3 Met. (Ky.) 162.

[4] 1 Prest. Est. 75. [5] Id. 63; 2 Fearne, Cont. Rem. Smith's ed. § 90.

[6] Wms. Real Prop. 218.

heirs; and that the moment J. S. died, if A were then living, it would vest in these heirs.[1]

3. The contingency in the above case was in the time when an event, namely, the death of J. S., which was sure to happen at some time, would take place, as compared with that of A. The one who was to be the heir of J. S. might have been living when the grant was made, but he could not become the ascertained heir until the death of J. S.; and upon the question, whether this should take place before or after A's death, depended the taking effect or not of the grant of the remainder.[2] Another case may be where an estate is limited to A for life, remainder to the oldest son of B, who then has no son. The *contingency in that [*237] case is that of a son being born to B. If he has a son, the moment he is born the remainder becomes vested in him, and ceases to be contingent. In both the above cases, if the event which in the one is certain fails to take place at a proper time, or, in the other, if the uncertain event fails to happen at all, the remainder fails from the want of a person to take it when the particular estate determines, and the estate reverts at once to the grantor.[3] So where there was a devise to a wife for life, and at her death to be divided to and among such of testator's children as shall then be living, share and share alike, it was a contingent remainder: if one of these die in her lifetime, his share is lost, although he leaves a child. The latter takes nothing.[4] Another instance would be that of an estate to A for life; and if B outlive him, then to B in fee. There is here no contingency about the person who is to take, but the contingency is in the event of his outliving A; for if he die before A, though all along ready to take the remainder if it falls in, the remainder as such goes to no one. If A die first, the remainder not only becomes vested in interest, but at once in possession.[5] Another and familiar illustration would be where this estate was limited to

[1] Wms. Real Prop. 220; Year Book, 9 Henry VI. 24 a; Perkins, § 52.

[2] 2 Bl. Com. 169–171.

[3] 2 Bl. Com. 169–171.

[4] Thompson *v.* Luddington, 104 Mass. 193. See also Olney *v.* Hull, 21 Pick. 311.

[5] 2 Bl. Com. 169–171.

A for life, remainder to B after the death of A and H. Here B is a known person *in esse*, ready at all times to take the remainder. It is certain that A will die, and that H will also. The contingency is in the doubt whether H will die before A. If he does, the grant is thereupon converted into a simple limitation of an estate to A for life, with a remainder to B, and is a vested one. But if A dies first, B's remainder is wholly gone, because he can only take it when A and H are both dead; and by the death of A before H, the particular estate in A determines before B can take, and consequently his remainder fails, and the estate reverts to the grantor.[1] And to these may be added, for further illustration, a conveyance in trust for the grantor for life, and after his death to A, when and provided he attain the age of twenty-one years. The interest of A was held to be a contingent remainder until he arrived at that age.[2]

4. For a long time a contingent remainder was not supposed to be the subject of alienation, because it was rather a possibility than an estate, like the possibility of an heir at law, for instance, having the estate when his ancestor shall have died.[3] But it is now settled, that where the contingency upon which the remainder is to vest is not in [*238] respect to the person, * but the event, where the person is ascertained who is to take if the event happens, the remainder may be granted or devised, and the grantee or devisee will come into the place of the grantor or devisor with his chance of having the estate. But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder.[4] And where one settled on herself an estate for life, with a remainder to her children if she had any, and if she had none, then to her heirs at law, it was held that she had a devisable interest in the estate, and that her devisees, at her death without children, took in preference to her heirs, the word "heirs" being here a word limiting the reversionary interest in her.[5]

[1] 2 Bl. Com. 169–171.

[2] McGowan *v.* Way, 1 Met. (Ky.) 418.

[3] Wms. Real Prop. 232.

[4] Wms. Real Prop. 231; 1 Prest. Est. 76; *post*, *465.

[5] Loring *v.* Eliot, 16 Gray, 574.

5. Mr. Fearne, and after him Mr. Cruise, divides Contingent Remainders into four classes.[1] And though Mr. Cornish and Chancellor Kent disapprove of this classification,[2] as it is at least a harmless one which it may be convenient to follow, though not strictly logical or scientific, it will be generally retained here.

6. The first class embraces cases where the particular estate, though less than a fee, and indefinite in its duration, is subject to be determined by the happening of some contingent event, and the remainder is made to depend upon the happening of this event. Thus if a feofment is made to the use of A until B returns from Rome, and upon his return then over to C, the remainder to C is contingent, because the event upon which it depends may never happen. B may die in Rome, or A may die before B returns; and in either event, the estate to C is defeated; in the one, because the event never has happened, and never can; in the other, because the particular estate in A will have determined before the remainder to C, dependent upon it, can have become vested. This would, of course, exclude those cases where the remainder is limited upon a particular estate definite in its duration, as an estate for life which is sure to determine, and upon the determination of which the remainder is to take effect. It would exclude also cases of conditional limitation as heretofore defined, where the remainder, though contingent, instead of waiting for the regular *determination of [*239] the particular estate, takes effect upon the happening of an event which curtails or defeats the particular estate before its natural determination, as would have been the case had the limitation in this case been expressly for life to A; but if B return from Rome, then over to C. The return of B would still be contingent, and the remainder to C would still take effect, but it would be at the expense or to the destruction of the balance of A's life-estate.[3] And the same

[1] Fearne, Cont. Rem. 5; Boraston's case, 3 Rep. 19.

[2] 4 Kent, Com. 8th ed. 208, n. Blackstone divides them into two classes only: 1st, where the person to take is dubious and uncertain; 2d, where the event is vague and uncertain. 2 Bl. Com. 169.

[3] Fearne, Cont. Rem. 5, 10, and Butler's notes; 2 Cruise, Dig. 204.

would be true of a grant to A and his heirs till B comes back from Rome, and then to C, who would take, if at all, a conditional limitation, and not a remainder, because the estate in A is a determinable fee which must be defeated by B's return, or C cannot take at all.[1]

7. The second class embraces cases where, though the particular estate is limited so as to determine with certainty, and it is unimportant where or how this is to happen, the remainder is made to depend upon the contingency whether a certain collateral event shall happen or not before the particular estate shall have determined. Thus, where an estate is limited to A for life, remainder to B for life, and, if B die before A, remainder to C for life, A is sure to die, and his life-estate to determine. But whether C shall have the remainder at his death, depends upon the collateral contingent event whether B shall have died before A or not. If B outlives A, he takes the remainder, and C takes nothing. If B dies first, C's remainder becomes at once vested, and he comes in at A's death, as if there had been no limitation to B.[2]

8. The third class includes those cases where the contingency on which the remainder depends is, whether an event which is sure to happen shall happen or not before the expiration of the particular estate which supports it; for if, by the common law, it should not happen until after the determination of the particular estate, the remainder dependent upon it would fail, as there would be nothing to sustain the seisin in the mean time between the determination of the particular estate and the time when the remainder might otherwise have vested. An example of this class would be a grant to A for life, remainder after the death of J. S. to J. D. for life. Now, it is certain that A will die, and that J. S. and J. D. will die; but whether J. S. shall die or not [*240] before J. D. is wholly uncertain, * and the remainder to J. D. is contingent. Of the same character would be a limitation to the use of A for twenty-one years, if he shall so long live, and after his death to B in fee. Here, as

[1] Fearne, Butler's ed. 13, note; Smith, Executory Interest, 57, § 166.

[2] Fearne, Cont. Rem. 8, and Butler's note; 2 Cruise, Dig. 204; Co. Lit. 378, a.

A may survive twenty-one years, the remainder dependent upon it is contingent, and being such is void, as it has no particular estate or freehold to sustain it.[1]

9. The fourth class of contingent remainders is, where the contingency depends upon the uncertainty of the person who is to take the remainder, either because he is not in being or not ascertained at the time the limitation is made. An example of this kind would be that of an estate limited to one for life, remainder to the oldest son of J. S., who has none at the time of the limitation made, or remainder to the heirs of J. S., who is living at the time. So a grant to A and B for life, remainder to the survivor, would be of this class. In all these cases, there is no means of knowing when the limitation is made, who, if any one, will be entitled to the remainder when the particular estate shall determine.[2] Thus, upon a devise to a daughter and her husband for their respective lives, remainder to the heirs of the daughter, it was held that the devise over to the heirs of the daughter was contingent until her death, at which time it vested in whoever were her heirs.[3] And in another case, where the devise was to a husband and wife during life, and then to the use of such child or children as might be procreated between them, until a child was born the remainder was contingent. Upon the birth of a child it vested in him; and as other children were born, the estate opened and let them in to share in the same as a vested remainder.[4]

10. In applying these rules, there are found to be cases where the decision seems at first sight to be at variance with the letter of the rule, and to form an exception to the same, while in reality carrying out the reason and spirit of the rule. Thus, * under the third rule, one of the [*241] cases given is that of a limitation to A for twenty-one years if he shall so long live, with a remainder over at his death. The remainder in such a case is contingent from

[1] Fearne, Cont. Rem. 8; Boraston's case, 3 Rep. 20.

[2] Fearne, Cont. Rem. 9; 2 Cruise, Dig. 206; Loring *v.* Eliot, 16 Gray, 572.

[3] Richardson *v.* Wheatland, 7 Met. 169; Moore *v.* Weaver, 16 Gray, 307.

[4] Carver *v.* Jackson, 4 Pet. 90. See also Olney *v.* Hull, 21 Pick. 311; Sisson *v.* Seabury, 1 Sumn. 235; Doe *v.* Considine, 6 Wall. 477.

the uncertainty of A's dying during the twenty-one years, and is moreover void, if a freehold, because the particular estate is only a term for years. But if the term had been to A for eighty years, for instance, if he so long lived, with a remainder over *at his death*, the chance of his dying within that term is so great as to be treated as morally certain to happen, and therefore such a limitation is regarded as an estate to A for life, remainder to another, who, if *in esse*, takes a vested and not a contingent remainder.[1] The cases cited happened to have been those where the time was obviously likely to extend beyond the life of the termor. But it is apprehended that a much shorter time would come within the same rule, if, by the scale of chances of life, the termor may not be calculated to outlive the term. Thus, if, for instance, the termor was an old man when the limitation was made, a much shorter term than eighty years would bring it within the doctrine of Lord Derby's case.[2]

11. It may be proper to remark here, though somewhat by anticipation, that there is no difficulty in limiting a contingent remainder of a term for years upon a preceding term for years, since in that case the seisin and freehold remain in the lessor unaffected by the contingency.[3]

12. So there are what seem to be exceptions to the fourth class of contingent remainders. Prominent among them are limitations coming within the rule in Shelley's case. This rule will be more fully explained hereafter; but, as showing how far it forms the exception above referred to, it is proper to state, that it is accepted as one of the dogmas of the common law, that if one makes a limitation to another for life, [*242] with a remainder * over mediately or immediately to his heirs, or the heirs of his body, the heirs do not take remainders at all, but the word "heirs" is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent, and not by purchase. So if a man by

[1] Countess of Darbie's case, cited in Littleton's Rep. 370, where the term was eighty years. Weale *v.* Lower, Pollexf. 67, where the term was ninety-nine years. Napper *v.* Sanders, Hutt. 118, where the term was eighty years. 1 Prest. Est. 80; Fearne, Cont. Rem. 20-22; 2 Cruise, Dig. 206; 4 Kent, Com. 221.

[2] Fearne, Cont. Rem. 24; 1 Prest. Est. 81.

[3] Fearne, Cont. Rem. 285; 2 Cruise, Dig. 244.

his will gives an estate to a devisee for life, with a remainder over to his own heirs, they do not at common law take as remainder-men by the will, but by descent as reversioners and heirs, that being regarded as the better title. The statutes of several of the States have changed the rule in Shelley's case, so that, in similar cases, the heirs now take as remainder-men.[1] But such a remainder is contingent during the life of the first taker. The following are instances of such limitations: Grant to A, and B his wife, for life, and if they left no children, issue of their bodies, then to their heirs and assigns; if they left issue, then to such children and their heirs. A and B took a life-estate, and their children took as remainder-men in fee if they left any; and the limitation over to A and B's heirs did not unite with their life-estate so as to create a fee in them.[2] A devise to A for life, and if he have heirs of his body, then to him and his heirs; but if he should die without such an heir, the land was to be sold. It was held, that A took an estate for life, subject to be enlarged into a fee on the happening of the precedent contingency of leaving issue.[3] And now the same effect would be produced in England by a devise of a remainder to a testator's heirs under the statute 3 and 4 Wm. IV., c. 106, § 3, except that the remainder would be a vested one, as the heirs are ascertained simultaneously with the devise taking effect.[4] Another seeming exception arises in the case of a limitation to one with remainder to the "heirs" of another who is still living, where the context shows that the term is used in a popular and not a technical sense, meaning the children of a living person. In that case the term is regarded as a *descriptio personæ;* and whoever answers thereto, if living, may take the remainder as a vested one.[5]

13. The reader should bear in mind, that no degree of contingency of an enjoyment in possession by the remainder-

[1] Loring *v.* Eliot, 16 Gray, 572; *ante*, *240.

[2] Melsheimer *v.* Gross, 58 Penn. St. 412.

[3] Shriver *v.* Lynn, 2 How. 43, 56.

[4] 2 Cruise, Dig. 209; Wms. Real Prop. 225, and Rawle's note; Fearne, Cont. Rem. 28, and Butler's note; Shelley's case, 1 Rep. 93; *post*, § 8,

[5] Fearne, Cont. Rem. 209; Bowers *v.* Porter, 11 Pick. 98, 208; 2 Jarm. Wills, 10, and Perkins' note.

man of the estate limited to him affects the question of its being vested or contingent.[1] If a remainder be limited to one who is alive and ascertained, and has a present capacity to take the possession and enjoyment of the same, and no event but the determination of the prior estates is necessary to give him the right to such possession and enjoyment at any moment when the prior estates shall determine, it will be a vested one, though it might be limited to one for [*243] life after the expiration of a term * of ever so many years. It is obvious, therefore, that a remainder, contingent at its creation, may become vested, though the one to whom it is limited may never himself have an opportunity to enjoy it in possession. Thus a limitation to A for life, remainder to the oldest son of B, becomes a vested remainder in the son the moment he is born, and though he may not outlive A to enjoy it in possession.

So, though the first or particular estate be so limited that it must expire on the happening of an event which is sure to occur at some time, and may expire before that event happens, in which contingency there is a limitation over to a person *in esse*, the remainder of this particular estate itself will be deemed a vested one, however improbable the contingency may be of its ever taking effect in possession. Thus upon a grant to A for life, remainder to B during the life of A, the estate in A must determine some time by death. It may determine by some act of forfeiture on his part; and if it does, B is a person *in esse* ready and capable of taking it, and it is therefore in him a vested remainder.[2] It may be remarked in passing, that the above remainder to B is of the same character as that which is limited to trustees to preserve contingent remainders, which will be explained hereafter.

14. After this explanation, it is not difficult to understand that there may be a vested remainder limited after a contingent one, which shall be good, provided the prior remainder be not a fee; so there may be a succession of contingent remainders, where a subsequent one may become vested while

[1] Williamson *v.* Field, 2 Sandf. Ch. 533.

[2] Wms. Real Prop. 223; Parkhurst *v.* Smith, Willes, 327; 2 Cruise, Dig. 210, 211.

the prior one remains contingent. Thus in one case the limitation was to A for life, remainder to his first and other sons in tail, remainder to B for life, remainder to his first and other sons in tail. Now, the remainders were contingent because there was no person *in esse* capable of taking them when the limitation was made. But if B had a son, the remainder to such son became at once vested, though no son may yet have been born to A, and the remainder to him was consequently still contingent.[1]

*15. In the above cases, the remainders were con- [*244] tingent because limited to persons not *in esse*, and were of the fourth class above stated. But a case may occur where a vested remainder is preceded by a contingent one, and will be good, though limited to persons *in esse*, if the prior limitation depended upon an event whose contingency did not extend to the subsequent limitation. The leading case illustrative of this is Napper *v.* Sanders. There the feoffor made a feofment to her own use for life, remainder to the use of feoffees for eighty years, if one N. S., and one E. S. his wife, so long lived; if E. S. survived N. S., her husband, then to her for life; and, after her death, to B. S. in tail; and, for default of issue, to E. N. and D. S. and F. S. and the heirs of their bodies, remainder to the heirs of the feoffor. If this case is analyzed with reference to the rule above stated as to the effect of a limitation for eighty years, it will be found to present this succession of estates: first, a life-estate in the feoffor; next, a vested remainder to the feoffees for the joint lives of N. S. and E. S. because measured by their lives, though nominally a term of eighty years, with a contingent remainder for life to E. S. dependent upon her surviving her husband N. S. Then follows an estate-tail to P. S., which is a vested remainder, because he is *in esse*, capable to take, and the same is to take effect in him upon the death of E. S., without being in any way dependent upon the contingency of E. S. surviving her husband, as her own estate for life had done. Then follow the ulterior limitations of successive remainders after

[1] Uvedall *v.* Uvedall, 2 Rolle, Abr. 119; Fearne, Cont. Rem. 222, 224; 2 Cruise, Dig. 216; Lewis *v.* Waters, 6 East, 336.

the determination of the estate-tail in P. S., which are also vested.[1]

16. The case of Lethieullier *v.* Tracy is another example of a vested remainder limited after a contingent one, where the contingency on which it depends does not affect the subsequent remainders. There was, in that case, a devise to a daughter for life, remainder to trustees to support contingent remainder, remainders to her first and other sons in tail; and if she died without issue living at her death, then to trustees and their heirs until H. N. attained twenty-one years. Then the devise was to H. N. for his life, remainder to trus-
[*245] tees to support contingent * remainders, remainder to the first and other sons of H. N. in tail; and in default of such issue, or in case H. N. died before twenty-one and without issue, remainder over to S. L. for life, remainder to C. L. Two or three things are to be observed in analyzing this succession of estates, and reaching a conclusion in respect to them. The devise to trustees in the first clause is, as above explained, merely for the remainder of the life-estate in the daughter, if she should forfeit or lose it before her death. And as to the second limitation to trustees, though in terms to them and their heirs, and apparently constituting an immediate remainder in fee, with remainders limited after its determination, yet it should be borne in mind that the duration of the estate of a trustee is measured by that of the equitable estate in the *cestui que trust*, as heretofore shown.[2] In the present case, therefore, the limitation to the trustees was, in effect, of an estate determinable upon the death of H. N., or his arriving at the age of twenty-one. This, then, would be the order of the several estates in this case: *first*, the particular estate to the daughter for life; *second*, remainder to her issue, if any living at her death; *third*, remainder upon failure of her issue to trustees, &c., until H. N. attained twenty-one years; *fourth*, remainder to H. N. for life after attaining twenty-one years; *fifth*, remainder to his sons, &c., and in default of such issue, *sixth*, to S. L.; and, *seventh*, remainder to C. L. The question was, whether the contingency of the daughter's dying

[1] Napper *v.* Sanders, Hutt. 117; Fearne, Cont. Rem. 224.

[2] *Ante*, pp. *186, *187.

without issue living affected any subsequent estate except that to the trustees; and it was held that it did not, and that the contingency on which the estate to the trustees was limited was not only her dying without issue, but her dying thus during the minority of H. N.; that H. N. being alive, and S. L. and C. L. also being alive and capable of taking as the several remainders should fall in, the remainders to them were vested. In respect to the remainder to H. N., Mr. Fearne says it was only contingent until he should attain twenty-one years; and Mr. Cruise follows his language. But in Ambler it is said, "The limitation to H. N. is a vested remainder," p. 207; *and in Atkyns, p. 784, "The subsequent limitations to H. N., after attaining twenty-one, and likewise to the Lethieullers, are vested remainders." But if treated as contingent until H. N. was twenty-one, as Mr. Cruise seems to regard it, what he says is true, and equally illustrative of the point for which the case is cited: "This contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse* were vested." [1] [*246]

17. Though, as has been shown, there may be a vested remainder limited after an intermediate contingent one between the particular estate and the vested remainder, it is sometimes difficult to determine whether the subsequent remainder is a vested one, or is so affected by the contingency on which the prior one depends, and which renders that contingent, as to be itself contingent. The following case may illustrate the nature of such a contingency in a prior estate as will raise the question whether the subsequent one is affected by it as a condition, though the case is one of executory devise, and not of a remainder proper, and the reader is not, therefore, to be misled by it: A devised to his wife for life, and after her death to the child of which she was *enceinte;* and if he died before twenty-one, then a devise over. The wife was not *enceinte;* and the question was, whether her being *enceinte* was not a condition upon which the devise over depended; and it was held that it was not, and that the

[1] Lethieullier *v.* Tracy, Ambl. 204, s. c. 3 Atk. 774; 2 Cruise, Dig. 221; Fearne, Cont. Rem. 225; Doe *v.* Ford, 2 E. & B. 970; 1 Jarm. Wills. 755.

devise over, notwithstanding her not being *enceinte*, was good.[1] A, by his last will, devised an estate to J. S.; and if, or in case, he dies, then to J. D.: it was held not to create a contingent remainder, or, in fact, any remainder, in J. D. The contingency contemplated had reference to J. S. dying or not before the testator. If he survived the testator, he took a fee. If he died in the testator's lifetime, the devise would lapse, and that to J. D. would take effect immediately on the death of A.[2]

18. The cases involving questions of this kind have been divided by Mr. Fearne, in which he has been followed by other writers, especially Mr. Cruise, into three classes. The first of these consists of limitations after a preceding estate which is made to depend on a contingency which never takes effect. The above-cited cases of Napper *v.* Sanders and Lethieullier *v.* Tracy will be found to come within this class, of which another example is furnished in the following case: A devise was made to the use of the testator's son for life, and [*247] on his decease remainder * to the use of his first and other sons by any future wife, in tail male. Then followed a proviso, that, if the son should marry any woman related to his present wife, the uses to the issue of such marriage should be void, and the premises should be held to the use of the children of John Hay. Nothing, however, was said as to what was to become of the estate if the son did not so marry; and it so happened that he did not marry at all, leaving, of course, no issue of any marriage. The question arose, whether after the testator's and the son's death the children of John Hay took any thing, and whether the marriage of the son with some person related to his first wife was not a condition precedent on which this devise over to them depended. The court held that this contingency only affected the son's own issue, and that the son of John Hay took the estate.[3] And the rule upon the subject may be stated in the language of Lord Thurlow: "Wherever the prior estate is

[1] 2 Cruise, Dig. 821; 6 Id. 415; Fearne, Cont. Rem. 133.

[2] Wright *v.* Stephens, 4 B. & Ald. 574; Sims *v.* Conger, 39 Miss. 232.

[3] Fearne, Cont. Rem. 233; 2 Cruise, Dig. 221; Bradford *v.* Foley, 1 Doug. 63.

made to depend upon any *described event*, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but upon its failure the second estate must take place." [1]

19. The determination of these questions, however, often depends upon the intention of the testator as expressed in his will. Thus, where the devise was to trustees to pay rents, &c., to the testator's daughter for life, with a provision, that, if she survived her husband, they were to hold all the lands to her for life, then to her son and the heirs of his body, remainder to the heirs of the body of the husband, and other remainders over. Now, it happened that the daughter died before her husband. One set of claimants insisted, that, by reason of this, all the limitations over failed and became void, as they depended upon the contingency of her outliving her husband. The other set contended, that this contingency affected only the remainder to the wife for life. But the court held, that the testator intended that all these limitations should depend upon the contingency of her surviving her husband, and that they had therefore failed.[2]

* 20. The second class of limitations of successive [*248] remainders of which the first depends upon a contingency embraces cases of limitations over upon a conditional determination of a preceding estate, where such preceding estate never takes effect. As this can be rendered plain only by stating cases, the following may serve for an illustration of the proposition: A devise was made to A for a term of years, with remainder to the first and other sons of B in tail male, successively, *provided* they should take the name of the testator; but in case they should refuse to take his name, or should die without issue, then to the first-born son of C in tail male, with remainders over. In terms, this is a limitation over to the son of C upon the conditional determination of the preceding estate in B's sons: if they refuse to take the testator's name, or if they die without issue, it goes to the first-born son of C. Now, in fact, B never had a son, and is

[1] Scatterwood *v.* Edge, 1 Salk. 230, n.; Doe *v.* Brabant, 3 Brown, Ch. 393, 397.

[2] Doe *v.* Shipphard, 1 Doug. 75.

dead. The question is, whether C's son, who is living at the testator's death, takes any estate or not. If the condition on which B's son was to take affected C's son also, when the condition failed as to the former, it had a like effect on the latter. But if the estate to B's son was merely precedent to that of C's son, the condition annexed to it did not affect the estate of the latter; and when the former failed, the latter took effect as if no such prior limitation had been made. And this was the construction which the court gave to the limitations.[1]

21. The third class of limitations above referred to comprises those limited to take effect upon the determination of a preceding estate by a contingency, which, though the precedent estate takes effect, never happens.

Two cases may be given for the purpose of illustrating this proposition. A devised to his son in tail male, remainder to B for life, remainder to B's sons in tail male, on condition he should change his name; and if he or any son of his refused to do so, then he declared the devise to them to be void, and gave the estate to D. The son died without issue. B then performed the condition, but died without issue. It was held, that D's estate in remainder was defeated by B having performed the * condition, upon failing to do which the devise to him was to be void, and go over to D.[2] Another case was the following: A made a devise to his wife for life; but if she should marry again, then that his son H should, presently after his mother's marriage, enter and enjoy the premises to him and the heirs male of his body, with remainders over. The wife survived the husband, but did not marry again, and died unmarried. A question arose between the heir at law of the testator and the issue male of the son, whether the remainder over to the son in tail took effect, the widow not having married again. The preceding estate to the wife took effect, and the limitation to the son in tail was in terms to take effect, if at all, after the determination of her estate by her marrying again, which was of course a contingent event, and which never did happen. Yet the

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[1] Scatterwood *v.* Edge, 1 Salk. 230.

[2] Amherst *v.* Lytton, 3 Brown, P. C. 486; Fearne, Cont. Rem. 238.

court held, unlike the first case, that the limitation over did take effect, because, taking the whole devise together, such was the intention of the testator.[1] In one of these cases a remainder was limited after another estate in remainder which depended upon a contingency for its taking effect; and it was held, that by the happening of such contingency, and the prior estate taking effect, the subsequent remainder was defeated. In the other the prior estate actually took effect; and the subsequent estate, which by its terms was to take effect if the first was defeated by the happening of an event which never happened, and of course the prior estate was not defeated, was held not to be thereby defeated, but to be valid, and to take effect upon the natural determination of the prior estate by the death of the wife. And the reason for this distinction was, that such seemed to be the intention of the devisor; the court holding in the latter case, that the limitation was in effect the same as if it had been to his widow during widowhood, with a remainder over to his son H.[2]

22. After all, whether the contingency on which a prior remainder limited in a will depends is to affect the subsequent *ones in succession, is governed by the [*250] intention of the devisor as expressed in the will; and where there is no apparent distinction in view in this respect between the several successive estates, the contingency of the first would ordinarily affect the whole train of ulterior limitations.[3] Thus, where the devise was to A for life, remainder to his children, and if he die without children, then over, it was held, that both were contingent remainders; but if a child were born, the remainder would vest in him at once, subject to open and let in after-born children, while the remainder over would be gone for ever.[4]

23. Notwithstanding a remainder limited after a remainder in fee would be void, as has been often repeated, yet two remainders may be so limited, though each a fee, as to be good,

[1] Luxford *v.* Cheeke, 3 Lev. 125; Fearne, Cont. Rem. 239.

[2] Fearne, Cont. Rem. 239.

[3] 2 Cruise, Dig, 223; 1 Prest. Est. 88; Fearne, Cont. Rem. 235; Davis *v.* Norton, 2 P. Wms. 390.

[4] Doe *v.* Considine, 6 Wall. 477; Doe *v.* Perryn, 3 T. R. 484.

provided this is so done that only one is to take effect, the one being a substitute for, and not subsequent to, the other. The consequence is, that, if the first takes effect and becomes vested, the other at once becomes void. Such limitation is said to be of *a fee with a double aspect.* A case illustrative of this proposition is that of Luddington *v.* Kime, where the devise was to A for life; and if he had male issue, then to such issue and his heirs; but if A died without issue male, then to T. B. in fee. Here are two remainders contingent in their character, and both in fee, dependent upon the same particular estate, and to take effect, if at all, upon the determination of that estate; and only one of these can take effect. If A has issue, the remainder vests at once in such issue, and defeats the limitation to T. B. altogether. On the other hand, if A dies without issue, T. B.'s remainder at once vests in him, and takes effect as a substitute for the other: neither is by its terms to wait until the other shall have once taken effect, and afterwards been determined.[1] Among other cases which might be referred to for illustration of the doctrine above stated is that of Doe *v.* Challis. The devise in that case was to trustees for the life of the testator's daughter E. M., and after her death to her children and their heirs; and if her children all died under age, or she had no children, the devise was to the testator's other children for life, and after their death to the children of such children and their heirs. Now, if E. M. had died leaving children, the estate would have vested in them, and any limitation over could only have taken effect as an executory devise. Until she had children, the remainder to them was of course contingent; and as she never had any, it never took effect, and the limitation subsequent to that in terms took effect as a contingent remainder, supported by the life-estate in E. M., and became vested on her death. And it is stated as a general proposition, that although, where a fee is given by a vested limitation, remainder upon it must be an executory devise, and, if it be too remote, this and all subsequent remainders are void, yet if a fee be limited in contingency, and the estate is given

[1] Luddington *v.* Kime, 1 Lord Raym. 203; 2 Cruise, Dig. 217; 1 Prest. Est. 94; Dunwoodie *v.* Reed, 3 S. & R. 452; Goodwright *v.* Dunham, Dougl. 265.

over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. And it may be added, an estate may be devised over in either of two events; and in one event the devise may operate as a contingent remainder, in the other as an executory devise.[1]

24. From these examples, it would seem to follow, almost as a corollary, that, if there is a contingent remainder limited in fee, no after-limitation dependent upon it can be a vested one. Thus, though T. B. was alive, ready and capable of taking, except so far as his capacity depended on A's dying without issue, yet his remainder could not be otherwise than contingent while A lived; for so long as he lived, there was a possibility of A's *having issue, and thereby [*251] rendering the limitation to T. B. void, by the first remainder absorbing the entire fee.[2] And the reader will remark the distinction between this case and the one before mentioned, of a remainder being vested though subsequent to a contingent one, since in that case the prior contingent remainder was for life only, or in tail, and not in fee-simple. It may, however, be remarked, somewhat by way of anticipation, that, by means of what is called an executory devise or shifting use, a fee may be limited to come in and take the place of a previous fee which has been created by the same will or deed.[3] And it should be kept in mind, that courts never construe a future and contingent estate an executory devise, where, by the rules of legal construction, it can be regarded as a remainder.[4]

25. It may also be again remarked, for the purpose of explaining what otherwise might seem to be an exception to the rule, that a fee cannot be limited by way of remainder after a prior estate in fee; that trusts may be limited to trustees and their heirs, and yet be determinable estates, upon which remainders may be limited, if the nature of the trust and the estate of the *cestui que trust* are in themselves thus deter-

[1] Doe *v.* Challis, 2 E. L. & Eq. 215, 225; Doe *v.* Selby, 2 B. & C. 926.

[2] 2 Cruise, Dig. 220.

[3] Dunwoodie *v.* Reed, 3 S. & R. 452.

[4] Blanchard *v.* Brooks, 12 Pick. 47, 63; Blanchard *v.* Blanchard, 1 Allen, 223; *ante*, pp. *226, *229.

minable, as was illustrated above in the case of Lethieullier *v.* Tracy.[1]

26. There is besides, under the statute of uses, a mode of creating future estates by what is called a power of appointment. Thus, for instance, A by his will devises to B for life, with a power in B, or some other person named, to appoint or declare who shall have the estate after the death of B. When such appointment or designation is made, the appointee takes under and by virtue of the will of the testator operating directly upon the estate, in the same manner as if the testator himself had named as devisee the person to take the estate. Sometimes the testator gives such a power in his will, and then devises over the estate to take effect if and in case the power shall not be exercised. Limitations of the lat-
[*252] ter kind are regarded * remainders, and as vested, although liable to be defeated if the appointment shall be made to another; for, until it is made, the possibility that it will be exercised does not create any estate, and therefore produces no effect upon the other limitation, even though the power be to appoint in fee. When exercised, its effect is merely to defeat the estate limited, and to divest it from him to whom it has been given.[2]

27. Questions of considerable difficulty often arise under wills, in relation to estates whose limitation is connected with some future event, to determine whether the vesting depends on that event, and the estate is, therefore, a conditional one; or whether the mere enjoyment of it is to depend upon when such event is to happen, the estate itself being a vested one. Of this kind was Boraston's case, already cited, where the devise was to A and B for the term of eight years, with remainder to the testator's executors until such time as H. B. should arrive at twenty-one years; and when he should come of full age, then that he should enjoy the same to him and his heirs for ever. H. B. died before he was twenty-one years of age; and the question was, whether the remainder limited to him

[1] Lethieullier *v.* Tracy, 3 Atk. 774.

[2] Fearne, Cont. Rem. 226; 2 Cruise, Dig. 221; 4 Id. 146. A devisor, however, cannot by his will reserve to himself the power of future appointment. Johnson *v.* Ball, 9 E. L. & Eq. 128.

was vested or contingent prior to his arriving at twenty-one. It was held to have been a vested one, because the term "when," used in the devise, applied only to the time of enjoyment, and not the time of vesting of the estate in him.[1] Lord Mansfield laid down two rules applicable to cases like these: the first of which is, that, where the whole property is devised, a particular interest created out of it will operate as an exception of the absolute property given to the devisee; the second, that where an absolute property is given, and a particular interest is limited in the mean time, as, for instance, till the devisee shall come of age, and the like, and then to him, it shall not be construed as a condition precedent, but as describing the time when the remainder-man is to take in possession. The first of these rules he derives from Matthew * Manning's case, and the second from the [*253] above case of Boraston.[2]

28. Sometimes an estate is limited upon a contingency, to which the effect of a condition subsequent is given. The estate, in such case, becomes vested at once, but is subject to be divested by the happening of the condition. Thus, for instance, a devise was to E. and J. for their lives successively, and, after the death of the longest liver of them, to A B, if he lived to attain the age of twenty-one years, but if he died before that age, then to C B if he survived A B and attained the age of twenty-one years. It was held, that the remainder vested at once in A B in fee, but was subject to be defeated if he died before twenty-one years of age, and then it would pass, not as a remainder, but as an executory devise to C B.[3]

[1] Boraston's case, 3 Rep. 19; Tomlinson *v.* Dighton, 1 P. Wms. 170.

[2] Manning's case, 8 Rep. 187 b; Boraston's case, 3 Rep. 19; Goodtitle *v.* Whitby, 1 Burr. 233. See Doe *v.* Lea, 3 T. R. 41; Doe *v.* Moore, 14 East, 601. Furness *v.* Fox, 1 Cush. 134, though a case of bequest of a legacy, involves the same rule of law.

[3] Bromfield *v.* Crowder, 1 Bos. & P. N. R. 313; Edwards *v.* Hammond, 3 Lev. 132; Doe *v.* Moore, 14 East, 601; Blanchard *v.* Blanchard, 1 Allen, 223; Manice *v.* Manice, 43 N. Y. 380.

SECTION IV.

OF THE EVENT ON WHICH CONTINGENT REMAINDERS MAY VEST.

1. It must be a legal, or not an illegal one.
2. It must not be too remote.
3. Of a possibility upon a possibility.
4. What limitations would be too remote.
5. The event must not abridge the particular estate.
6. Illustration of the last proposition.
7. Merger of the particular estate in the remainder.

1. HAVING thus considered the circumstances which will render a remainder contingent, it is next proposed to examine, somewhat more in detail, as to the event upon which such a remainder may be limited. In the first place, such event must be a lawful, or at least not an unlawful one; and where, therefore, a remainder was limited to a bastard not *in esse*, it was held to be void.[1]

2. In the next place, the event must not be too remote, or beyond what is deemed in law to be a common possibility, such as that of the death of a person, or of his dying without issue or of coverture, or the like. If the event is not [*254] within such a *possibility, a limitation dependent upon it is void at common law.[2]

3. There has been a great deal of refinement and subtlety expended in applying this rule against too remote possibilities in determining questions of limitation of future estates. Lord Coke, drawing his premises from the logic of the schools, laid it down as a rule of construction, that a double possibility, or a possibility upon a possibility, would not be sufficient to support a limitation in the way of remainder. Such a limitation would be one to A for life, remainder to William, the son of

[1] Wms. Real Prop. 226; Blodwell *v.* Edwards, Cro. Eliz. 509.

[2] Cholmley's case, 2 Rep. 51 b; 2 Bl. Com. 169; Dennett *v.* Dennett, 40 N. H. 503. But this is altered by statute in some of the States, whereby the remoteness of the probability does not affect the validity of the limitation. *Post*, p. *266; Wms. Real Prop. 252.

J. S., when J. S. has no son. Now, had it been to the son of J. S., it would have been an ordinary single possibility that he might have a son, and would be good. But where not only J. S. must have a son, but one who must be afterwards called William, it went beyond a mere possibility, and required a double possibility, or a possibility upon a possibility, and was therefore void. But fortunately a rule involving such subtle distinctions is now discarded, and a limitation like that supposed would be good.[1]

4. And yet there may be limitations too remote to be allowed in the disposition of an estate. Thus, an estate cannot be limited to an unborn person for life, followed by an estate to a child of such unborn person. The limitation to the child of such unborn person would be void as being too remote.[2] So a devise to the right heirs of A B, when there is no such person as A B living, would be too remote and void.[3] But a gift in remainder to an unborn person, either for life or in tail or in fee, will be good, unless it is preceded by a gift for life or in tail to the * unborn parent of [*255] that person.[4] So if the estate to the children of an unborn child be an estate-tail, the courts, in order to give effect, as near as may be, to the intention of the testator, hold that, in such a case, the devise of the estate to the unborn person for life shall be construed to be an estate-tail in him, so that, if he does not bar the entail, the *general intent* of the devisor that it should go to his issue will be effected.[5] The

[1] Wms. Real Prop. 227; Cole *v.* Sewell, 2 Conn. & L. Ch. 344, s. c. 4 Dru. & Warr. 27, s. c. 2 House of Lords Cas. 186.

[2] Wms. Real Prop. 228; 2 Prest. Abst. 115; Jackson *v.* Brown, 13 Wend. 442, 446; Watk. Conv. 196, Coventry's note; Hay *v.* Coventry, 3 T. R. 86; Brudenell *v.* Elwes, 1 East, 452. This may be assumed as a dogma of universal application, whether originally an inference or not, drawn from any rules against perpetuity affecting the alienation of estates.

[3] 2 Bl. Com. 170; Counden *v.* Clerke, Hob. 33 a.

[4] 2 Prest. Abst. 115; per Lord Kenyon, Brudenell *v.* Elwes, 1 East, 453; 2 Bl. Com. 170; 2 Fearne, Cont. Rem. Smith's ed. §§ 711, 713; Watk. Conv. 195, Coventry's note; Jackson *v.* Brown, 13 Wend. 437.

[5] Monypenny *v.* Dering, 16 M. & W. 428; Fearne, Cont. Rem. 204, Butler's note; Den *v.* Pukey, 5 T. R. 303, per Lord Kenyon; Wms. Real Prop. 230, and Rawle's note; Allyn *v.* Mather, 9 Conn. 127; Chapman *v.* Brown, 3 Burr. 1626; Jackson *v.* Brown, 13 Wend. 437; Watk. Conv. 196, Coventry's note; Humberston *v.* Humberston, 1 P. Wms. 332.

result of applying the rule last stated in those States where fees-tail are abolished, is, that such first-named unborn person will take a fee-simple, although the estate is expressly given him for life.[1] But this would be confined to devises, and not extend to conveyances at common law.[2] The rule, as applicable to the case of a will, seems to rest upon an admitted principle, that "there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect."[3]

5. Another requisite in the event upon which a contingent remainder may depend is, that it must not be such as to abridge the particular estate; for it is of the essence of a remainder that it should wait until the particular estate has had a natural determination, according to the terms of its limitation. The remainder must not, therefore, be in the nature of a condition at common law which may defeat the particular estate: for, first, no one but the grantor in such a case could take advantage of it; and, second, upon his doing so in the only way in which it can be done, — namely, by the making of an entry, — he would thereby regain his original seisin, [*256] and defeat the seisin as well * as the freehold on which the remainder depended:[4] wherefore no remainder could be limited upon a condition. If the particular estate be limited to two, with a remainder over upon the death of one of them to a stranger in fee, the remainder is void, because, as the survivor must have the estate for life by reason of his having been a joint-tenant with the deceased, the limitation over upon the death of one can only take place by defeating the estate of the survivor. Had the limitation been to the survivor instead of a stranger, it would have been good.[5]

[1] Jackson *v.* Brown, 13 Wend. 447.

[2] Wms. Real Prop. 229, n.; 3 Report, Eng. Com. 4. See *post*, pp. *264, *265, as to statute of Indiana.

[3] Doe *v.* Cooper, 1 East, 234; Allyn *v.* Mather, 9 Conn. 127; Doebler's Appeal, 64 Penn. St. 15; Nourse *v.* Merriam, 8 Cush. 11, where the devise was to a town for a school, but excluding certain families from attending it.

[4] 1 Prest. Est. 91; 2 Cruise, Dig. 234, 238. In several of the States a remainder may by statute be limited upon a contingency which may operate to abridge or defeat the precedent estate, and it is treated as a conditional limitation. See *post*, p. *265.

[5] 2 Cruise, Dig. 235, 237.

6. The proposition that a remainder must not abridge the particular estate may be illustrated by a limitation of an estate to a widow with an expectant estate depending upon it. Thus, supposing it were desired to limit an estate expectant upon her marrying again, it would not do to make an estate to her for life, remainder to A B in fee on condition she remains a widow; for if the heir were to enter upon her marrying again, and defeat the estate, he would also defeat the remainder. To accomplish the desired purpose, the limitation to the widow should be during her widowhood, with remainder over. The remainder, upon her marrying again, will then take effect upon the natural determination of her estate.[1] But it will be understood that the propositions here sought to be illustrated apply only to estates at common law; for a limitation of an estate after a prior one which is to abridge or defeat the first may be good if created by will, as a conditional limitation.[2] But if the happening of the contingent event gives effect to a remainder without affecting the particular estate, it may be a good remainder. Thus, where an estate was limited to A for life, remainder to his son, and if he died in the lifetime of A, then to B, there would be a good remainder in B; for the dying of the son did not affect A's estate, but merely fixed the time at which the estate in B * became vested;[3] though an estate so [*257] limited after another as to take effect on a condition, and which would defeat the remainder previously limited, though it did not affect the particular estate, would be void as a remainder, because limited on such a condition. Thus, where the limitation was to B for life, remainder to C for life, provided that, if the grantor had a son during his life who lived to the age of five years, the estate limited to C should cease, and the estate remain to the son in fee-tail, the remainder to the son was held void.[4]

7. A remainder may nevertheless be good, though limited upon an event that destroys the particular estate which sup-

[1] 2 Cruise, Dig. 235; Fearne, Cont. Rem. 262.

[2] Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 149; Sheffield *v.* Orrery, 3 Atk. 282; Fearne, Cont. Rem. 239, 262, 407.

[3] 2 Cruise, Dig. 235.

[4] Cogan *v.* Cogan, Cro. Eliz. 360.

ports it, provided it takes place by a union of the particular estate with the remainder, so as to merge the one in the other; though this cannot occur where the remainder is limited to a stranger, — a person other than the tenant of the particular estate. Thus, where the estate was limited by A to his wife and daughter for their lives and the life of the survivor, and if the daughter had issue, then, after the death of the wife, to the daughter and her heirs for ever, and if the daughter died single or without issue, then to the wife and her heirs, it would be a good contingent remainder to the daughter and the wife respectively. But the moment it should take effect in the daughter by her having issue, and upon the death of the wife, or in the wife upon the death of the daughter without issue, it would cease to be a remainder by merging the life-estate in itself as an estate in possession, of inheritance, with which she had thereby become clothed, as in that event the tenant for life would have become the owner of the inheritance.[1] But where the devise was to A and his wife B for life, and to the survivor, with a remainder to several others named, one of whom conveyed his interest to the husband in his lifetime, it was held not to merge his life-estate in this share in the remainder, because of the contingent intervening right of his wife to a life-estate in it if she outlived him.[2]

[1] Goodtitle *v.* Billington, Doug. 753. [2] Johnson *v.* Johnson, 7 Allen, 197.

* SECTION V. [*258]

OF THE ESTATE REQUISITE TO SUSTAIN A CONTINGENT REMAINDER.

1. Must be a freehold, if remainder is a freehold.
2. When terms for years regarded as freeholds as to remainders.
3. Term for years in remainder does not require a freehold.
4. Of the effect of disseisin, &c., of particular estate on a remainder
5. Loss of particular estate, before remainder vests, defeats it.
6. Remainder to child *en ventre sa mère*.
7. Estate of trustee supports remainder to *cestui que trust*.
8. Remainders may take effect as to some, and not as to others.
9. Devise of remainder to a class where a part only is *in esse*.

1. The next inquiry relates to the character of the estate which is necessary to support a contingent remainder as its prior or particular estate. For the reasons heretofore explained, this must be a freehold interest if the remainder is a freehold, since the holder of any less estate could not take and hold the seisin which is necessary to give effect to the remainder, where it comes to vest in interest and possession, or could not be "tenant of the præcipe," as it was called, to answer in suits to recover the freehold.[1] This, however, will be understood to be the rule of the common law, since, in some of the States, a freehold estate is not necessary to support what answers to a remainder at common law.[2]

2. For reasons heretofore explained, if the prior estate be a term for years, determinable upon the death of the tenant, and the term be so long, that, upon the ordinary chances of life, the tenant will die before it terminates, it is regarded as so far a freehold interest that a contingent remainder limited upon it will be good.[3]

3. And if the remainder be for a term of years, it does not, though contingent, require a particular estate of freehold to support it, since no seisin passes out of the grantor when he

[1] Burt. Real Prop. § 33; 3 Report Eng. Com. 5; 2 Bl. Com. 171.

[2] See *post*, pp. *264, *265.

[3] *Ante*, pp. *241, *244, *245; Napper *v.* Sanders, Hutt. 118; Countess of Darbie's case, cited in Littleton's Reports, 370; Fearne, Cont. Rem. 20–22; 2 Cruise, Dig. 243.

creates it; and, of course, no one need be constituted to keep it till the remainder takes effect. And until such future estate takes effect in possession, the limitation operates as a contract, and not as an estate. In such a case the prior or particular estate and the so-called remainder are not parts of one and the same estate as where the grantor's whole [*259] estate goes out of him to the particular * tenant and remainder-man, but they are in effect two successive estates, distinct and independent, being grounded upon several contracts.[1]

4. Although the loss of his estate by the tenant of the particular estate, whereby he is divested of his seisin, defeats at the common law a freehold contingent remainder dependent upon it, for reasons which will be hereafter more fully explained, yet if it be by disseisin only, and the tenant of the particular estate still has a present right of entry, the remainder will not be defeated.[2] Whereas if his right of entry be lost, and to obtain it he must bring an action in order to regain his seisin, it implies that the seisin is actually out of him and in another person holding adversely to the title under which he claims, and the remainder dependent upon it is therefore defeated.[3] So, at common law, a discontinuance created by a tenant in tail, by aliening the estate, would cut off a remainder dependent upon it, since the issue in tail thereby lost a right of entry, and were driven to an action to regain the seisin.[4] *

5. It may be added, although before stated, that the particular estate must be created by one and the same deed or

* NOTE. — In those States where the common law as to the effect upon a right of entry of a descent cast is changed by statute, and where the limitation of a right of entry is the same with that of a right of action, the distinction between having a right of entry and a right of action, in its effect upon contingent remainders, would seem to be done away with. Mass. Gen. Stat. c. 154, §§ 1, 13. For other statutes on the subject, see *post*, p. *264 *et seq.*

[1] Fearne, Cont. Rem. 285; 2 Cruise, Dig. 244; Corbet *v.* Stone, T. Raym. 151.

[2] Wms. Real Prop. 234; 2 Cruise, Dig. 245.

[3] Fearne, Cont. Rem. 286, 289, Butler's note; Davies *v.* Bush, 1 M'Clell. & Y. 88.

[4] 2 Cruise, Dig. 245.

instrument that creates the remainder; and the remainder must vest or become an actual estate during the continuance of the estate which supports it, or *eo instanti* that that estate determines.[1] If, therefore, there is so far an interruption of the seisin as to deprive the holder of the particular estate of a present right of * entry in the same, be- [*260] fore the remainder vests, so that, *when the contingency happens* on which it is to vest, the estate of the tenant of the particular estate or a present right of entry is not *in esse*, no subsequent restoration of the same will revive or give effect to the remainder, which has once failed for want of support.[2] Thus it is said, "If there be a tenant for life with a contingent remainder, and he makes a *feofment* in fee upon condition, and the particular estate determines before the condition is broken, the contingent remainder is destroyed; for there must be a particular estate, or a present right of entry, when the contingency happens. But if the tenant for life enters for breach before the contingency happen, the contingent remainder is revived, and may vest." [3]

6. And so far was this carried at common law, that, if the child who was to take the remainder were *en ventre sa mère* at the determination of the particular estate, the remainder failed. But this is now remedied by regarding such child as already born for the purposes of taking an estate by limitation or descent.[4]

7. In trust-estates, though generally governed, so far as contingent remainders are concerned, by the same rules as estates at common law, a rule prevails, that a legal estate of freehold in the trustee will support a contingent limitation of the estate of a *cestui que trust*, although this may not vest by the time the preceding equitable limitation in trust expires.[5] Nor can any *cestui que trust*, having a prior trust

[1] 2 Cruise, Dig. 246; 1 Prest. Est. 90; Wms. Real Prop. 225; 2 Prest. Abst. 114; Doe *v.* Morgan, 3 T. R. 763.

[2] Fearne, Cont. Rem. 315; Purefoy *v.* Rogers, 2 Lev. 39.

[3] Thompson *v.* Leach, 2 Salk. 576.

[4] Reeve *v.* Long, 1 Salk. 227; Stat. 10 and 11 Wm. III. c. 16; 4 Kent, Com. 249, and note. See *post*, p. *266.

[5] Fearne, Cont. Rem. 304, and Butler's note; 2 Cruise, Dig. 247; Hopkins *v.* Hopkins, 1 Atk. 590; Wms. Real Prop. 239; 1 Prest. Est. 241.

estate, destroy a contingent remainder expectant upon his estate by any mode of conveyance, since the legal estate in the trustee will support the remainders as they rise.[1]

8. As a consequence of carrying out at common [*261] law the *principles above stated, relative to the event upon which, and the time when, a contingent remainder must be limited to vest in interest, such a remainder may take effect as to some of the persons to whom it is limited, and fail as to others, by reason of their not being *in esse* when the particular estate determines. Thus, where a limitation is made to A for life, remainder to the heirs of J. and K., and J. dies before A., but K. survives him, the effect will be that J.'s heirs alone can take.[2]

9. But if the limitation be by devise to a class of persons, any of whom are alive and capable of taking at the death of the testator, the enjoyment of which is postponed till after the expiration of a particular estate, the estate will vest in such as are capable of taking at the death of the testator, and will open and let in such of the same class as may come *in esse* during the continuance of the particular estate.[3]

[1] Fearne, Cont. Rem. 21 a, and Butler's note; Davies *v.* Bush, 1 M'Clell. & Y. 82; 2 Cruise, Dig. 270; Penhey *v.* Hurrell, 2 Freem. 213; *ante*, p. *189.

[2] 2 Cruise, Dig. 256; Fearne, Cont. Rem. 312; Griffith *v.* Pownal, 13 Sim. 393.

[3] Doe *v.* Perryn, 3 T. R. 484; 3 Prest. Conv. 555; Fearne, Cont. Rem. 315, and Butler's note; 2 Jarm. Wills, 76, and Perkins' note of American cases; Doe *v.* Provoost, 4 Johns. 61; *ante*, p. *230; Moore *v.* Weaver, 16 Gray, 307.

SECTION VI.

HOW CONTINGENT REMAINDERS MAY BE DEFEATED.

1. By destroying the particular estate before vesting.
2. Conveyances under statute of uses do not affect remainders.
3. Exception to effect of merger of estates on remainders.
4. Of trustees to preserve contingent remainders.
5. In whom is the inheritance while remainder is contingent.
6. Of aliening contingent remainders.

1. At common law, there were various ways in which a contingent remainder might be defeated, by destroying the particular estate on which the remainder depended before it vested. It might be done by a feofment or forfeiture, or by surrender by the tenant to the reversioner or remainder-man, or by the inheritance descending upon the tenant and merging his particular estate in itself, or by the particular estate and the inheritance becoming united by conveyance or act of the parties, since the outstanding of a contingent remainder would not prevent the merging of the two, it not being an intervening estate.[1] So where the prior or particular estate was upon condition, and, before the remainder had vested, the condition was broken, and an entry had been made for the breach, whereby the estate was defeated by forfeiture, it was held to defeat the remainder also.[2]

* 2. If the conveyance by the tenant were by any [*262] form deriving its validity from the statute of uses, it would not have the effect to disturb a contingent remainder dependent upon it, since it would only pass what the tenant might lawfully convey, and not destroy the estate of any person.[3]

3. And there is an exception as to the effect of the union

[1] Penhey *v.* Hurrell, 2 Freem. 213; Fearne, Cont. Rem. 316, 340; 2 Cruise, Dig. 269; Doe *v.* Gatacre, 5 Bing. N. C. 609; Purefoy *v.* Rogers, 2 Lev. 39; 2 Bl. Com. 171; Wms. Real Prop. 233. Archer's case, 1 Co. 66 b.

[2] Williams *v.* Angell, 7 R. I. 152.

[3] 2 Sand. Uses, 11; Fearne, Cont. Rem. 321; Smith *v.* Clyfford, 1 T. R. 744 Dennett *v.* Dennett, 40 N. H. 498, 505.

of the particular estate and reversion of the inheritance in one ownership, operating to bar the contingent remainder, where the particular estate and remainder are created by will, and the reversionary inheritance comes by descent upon the tenant of the particular estate. Here, by the ordinary rules of law, the life-estate and the inheritance, coming together in the same ownership, would merge. But if that effect were allowed in this case, it would make one provision in a will destroy another, against the intention of the devisor. And it is accordingly held, that, in such case, the union of the two estates shall not operate to destroy the contingent remainder, but they shall open and let it in when it arises.[1] But if the tenant for life under a devise were not the heir of the devisor, and acquired the inheritance mediately by grant, devise, or descent from the heirs of the devisor or some other devisee, the union of the two estates would operate to destroy the contingent remainder by their life-estate merging in the inheritance.[2]

4. It was to guard against the possibility of any tortious acts on the part of the tenant of the particular estate, defeating the contingent remainder dependent upon it, that the scheme of "trustees to preserve contingent remainders" was devised, as it is said, by Sir Geoffrey Palmer and Sir Orlando Bridgman, in the time of the English Commonwealth. The effect of this was, to have some one with a vested remainder, competent at any moment to take and hold the particular estate for the balance of the term of its original limitation, if the first tenant thereof were to defeat his own estate by forfeiture or other act, or if his estate and the inher-
[*263] itance were to merge so as *otherwise to destroy it.[3]

The necessity of such a precaution is now done away with in England, and in most if not all the United States, so that a contingent remainder cannot be defeated by a determination of the particular estate of freehold by forfeiture, sur-

[1] Cresfield *v.* Storr, 36 Md. 129.

[2] Fearne, Cont. Rem. 340, Butler's note; Crump *v.* Norwood, 7 Taunt. 362; 2 Cruise, Dig. 273; *ante*, vol. 1, p. *139.

[3] 2 Bl. Com. 171; 2 Cruise, Dig. 315; Fearne, Cont. Rem. 325; Wms. Real Prop. 222, 237;

render, or merger, and, in some of the States, by no determination of such particular estate by any means whatever.[1]

5. It has at times been discussed, as something more than a mere matter of speculation, in whom the inheritance is, in the case of a limitation of a contingent remainder in fee, until the same vests by the happening of the contingency on which it depends. If the limitation be by the way of a use, there seems to be no question that it remains in the settler as grantor, or in the heirs of the devisor if created by last will.[2] The doubt arises where it is limited by a common-law assurance. It has been held by some, that, as the seisin and inheritance had passed out of the grantor without having vested in any one, the inheritance would be in abeyance.[3] Others, on the contrary, regard the inheritance as in the grantor, by a kind of reversionary interest, until the contingency happens by which the remainder becomes vested; and this seems to be now regarded as the better opinion.[4]

6. At common law, before the contingency happens, contingent remainders cannot be conveyed except by way of estoppel, though they are assignable in equity, since theoretically such a remainder is not an estate, but a mere chance of having one.[5] But where the person is ascertained who is to take the remainder, if it becomes vested, and he dies, it will pass to his heirs,[6] * or may be devised by [*264] him.[7] It might always have been released by him to the reversioner, and now by statute he may convey it by deed.[8] And where a deed of such contingent remainder operates by

[1] Wms. Real Prop. 236; Stat. 8 & 9 Vict. 106. See *post*, p. *266.

[2] 2 Cruise, Dig. 326; Wms. Real Prop. 221; Fearne, Cont. Rem. 351.

[3] 1 Prest. Est. 251; 2 Prest. Abst. 100–107.

[4] Co. Lit. 191 a, Butler's note, 78; Shapleigh *v.* Pilsbury, 1 Me. 280; 2 Greenl. Cruise, Dig. 330, n.; Rice *v.* Osgood, 9 Mass. 37, 44; Fearne, Cont. Rem. 354, 357. But see the remarks of Chancellor Kent on this subject, 4 Kent, Com. 259, 260, and note, that though good sense is with Fearne, the authorities are against him.

[5] Wms. Real Prop. 231, 233; 2 Cruise, Dig. 333; Fearne, Cont. Rem. 551; 1 Prest. Est. 76, 89; Robertson *v.* Wilson, 38 N. H. 48.

[6] Roe *v.* Griffiths, 1 W. Bl. 606; 1 Prest. Est. 76; 4 Kent, Com. 262.

[7] Roe *v.* Jones, 1 H. Bl. 33; 4 Kent, Com. 261; Roe *v.* Griffiths, 1 W. Bl 606.

[8] Wms. Real Prop. 231; 1 Prest. Est. 89; Stat. 8 & 9 Vict. c. 106, § 6. For statutes of the several States of the United States, see *post*, p. *267.

way of estoppel, it operates upon the estate itself whenever the remainder becomes vested, and the estoppel becomes an estate in interest. So all persons claiming by, through, or under the maker of such deed would be equally estopped with himself.[1]

SECTION VII.

AMERICAN STATUTES AFFECTING REMAINDERS.

1. Creating freeholds to commence *in futuro*.
2. Of limiting remainders so as to abridge prior estates.
3. Of remoteness of contingency affecting remainders.
4. Of effect of defeating particular estates on remainders.
5. Of descent and alienation of remainders.

INSTEAD of attempting to incorporate into the text the modifications of the common law which have been effected by legislation in this country in regard to remainders, or even to append such modifications in notes to the body of the work in any immediate connection with the parts where they might be more specially applicable, it has been thought better to embody them, under proper heads, in a separate section, as being more convenient for reference. So far as this is done, it will be chiefly confined to a mere statement of the several statutory provisions, with an occasional reference to decided cases.

1. (1.) *Of creating freeholds to commence in futuro.* In Alabama, no estate in lands can be created by way of contingent remainder, but every estate created by any will or conveyance, and which might have taken effect as a contingent remainder or executory devise, has the same properties and effect as the latter estate.[2] In New York, a freehold estate may be created to commence at a future day; a [*265] * remainder of a freehold, either contingent or vested, may be created expectant on the determination of a term for years; and a fee may be limited upon a fee upon a

[1] 4 Kent, Com. 8th ed. 263, n.; Doe *v.* Oliver, 10 B. & C. 181; Fearne, Cont. Rem. 365, § 5, and note; Stow *v.* Wyse, 7 Conn. 214.

[2] Ala. Code, 1852, § 1301; 1867, § 1571.

contingency within prescribed limits as to time.[1] The same provision is made in Michigan, Wisconsin, and Minnesota.[2] Freehold estates may be created to commence *in futuro* in Indiana, Michigan, Minnesota, and Wisconsin ;[3] and, whether they be created by deed or will, in Alabama, Iowa, Mississippi, Missouri, and Texas.[4] In Virginia and in Kentucky, estates may be created to commence *in futuro ;* and any estate which would be good as an executory devise or bequest will be good if created by deed.[5] In Illinois, Mississippi, and Missouri, when any estate is, by any conveyance, limited in remainder to the son or daughter of any person to be begotten, such son or daughter, born after the decease of the father, takes the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death.[6] In Indiana, fees-tail are turned into fees-simple ; and where a remainder is limited after what would be an estate-tail at common law, it will still be a remainder to take effect if the first taker die without issue.[7] In New York and Wisconsin, an estate for life can be limited after an estate for years as a remainder only to a person in being at the creation of such estate.[8]

2. (2.) *Of limiting remainders on a contingency which may*

[1] N. Y. Rev. Stat. 5th ed. 1859, pt. 2, tit. 2, art. 1, § 24; Stat. at Large, vol. 1, p. 673 ; 4 Kent, Com. 199, n.

[2] Mich. Comp. Stat. 1857, c. 85, § 24; 1871, c. 147, § 24; Wis. Rev. Stat. 1858, c. 83, § 24; Minn. Comp. Stat. 1859, c. 31, § 24; Stat. at Large, 1873, c. 32, § 24.

[3] 1 Ind. Rev. Stat. 1852, p. 238, § 7 ; 1862, vol. 1, p. 266 ; Mich. Comp. Laws, 1857, c. 85, § 24 ; 1871, c. 147 ; Minn. Comp. Stat. 1859, c. 31, § 24 ; Stat. at Large, 1873, c. 32 ; Wis. Rev. Stat. 1858, c. 83, § 24.

[4] Ala. Code, 1852, § 1301 ; 1867, § 1575 ; Iowa, Revision, 1860, § 2212 ; Code, 1873, p. 357 ; Miss. Code, 1857, c. 36, art. 1 ; Code, 1871, c. 52, art. 1, § 2284 ; Mo. Rev. Stat. 1855, c. 32, § 9 ; Stat. 1872, c. 140, § 8 ; Oldham & W. Dig. Tex. Law, 1859, p. 72, art. 206 ; Paschal's Dig. 1866, p. 261.

[5] Va. Code, 1849, c. 116, § 5 ; Code, 1873, c. 112, § 5 ; Ky. Rev. Stat. 1852, c. 80, § 6 ; Gen. Stat. 1873, c. 63, § 6.

[6] 2 Ill. Comp. Stat. 1858, p. 961 ; Rev. Stat. 1874, c. 30, § 14 ; Miss. Rev. Stat. 1857, c. 36, art. 9 ; Code, 1871, c. 52, art. 2, § 2292 ; Mo. Rev. Stat. 1855, c. 32, § 9 ; 1872, c. 140, § 8.

[7] Ind. Rev. Stat. c. 28, § 57 ; 1862, vol. 1, p. 266, § 36.

[8] N. Y. Rev. Stat. pt. 2, tit. 2, art. 1, § 21 ; Stat. at Large, vol. 1, p. 673, § 21 ; Wis. Rev. Stat. c. 81, § 21.

abridge, &c., a precedent estate. In Indiana, Michi-
[*266] gan, *Minnesota, and Wisconsin, a remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate;[1] and the rule is the same in New York, such a remainder being construed to be a conditional limitation.[2]

3. (3.) *Of remoteness of contingencies.* In Indiana, New York, Michigan, Minnesota, and Wisconsin, no future estate otherwise valid will be void on the ground of the probability or improbability of the contingency on which it is limited, to take effect.[3]

4. (4.) *Of defeating a particular estate.* In Massachusetts, Kentucky, Mississippi, Missouri, Texas, and Virginia, no expectant estate can be defeated or barred by any alienation or other act of the owner of the precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, or merger, subject to provision made by the party creating it.[4] And in Pennsylvania, where there was a trust in favor of A, with one in favor of her children in remainder who should be living at her death, the court refused to require the trustees to convey it to her that she might defeat the contingent remainder.[5] In New York, Michigan, Minnesota, and Wisconsin, there are substantially the same provisions, together with the following: "No remainder, valid in its creation, shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent

[1] Ind. Rev. Stat. 1852, p. 238, § 38; 1862, vol. 1, p. 266, § 38; Mich. Comp. Laws, 1857, c. 85, § 27; 1871, c. 147, § 27; Minn. Comp. Stat. 1859, c. 31, § 27; Stat. at Large, 1873, c. 32, § 27; Wis. Rev. Stat. 1858, c. 83, § 27.

[2] N. Y. Rev. Stat. pt. 2, tit. 2, art. 1, § 27; Stat. at Large, vol. 1, p. 673, § 27.

[3] Ibid.; Ind. Rev. Stat. c. 28, § 62; 1862, vol. 1, p. 266, § 40.

[4] Mass. Gen. Stat. c. 89, §§ 10, 11; Ky. Rev. Stat. 1852, c. 80, §§ 11, 12; Gen. Stat. 1873, c. 63, §§ 11, 12; Miss. Rev. Code, 1857, c. 36, art. 7; Code, 1871, c. 52, art. 2, § 2290; Mo. Rev. Stat. 1855, c. 22, § 9; Stat. 1872, c. 14, § 8; Oldham & W. Dig. Tex. Laws, 1859, p. 71, art. 202; Paschal's Dig. 1866, p. 257; Va. Code, 1849, c. 116, §§ 12, 13; 1873, c. 112, §§ 12, 13.

[5] Harris *v.* McElroy, 45 Penn. St. 220.

estate had continued to the same period.[1] In New York and Virginia, a posthumous child takes a contingent remainder, as if born at his father's death, without any intermediate estate to support it.[2] * He is considered as [*267] living, in Massachusetts.[3] See also, for the law in Arkansas, California, Georgia, Ohio, Missouri, and Wisconsin, the statutes and authorities cited below.[4]

5. (5.) *Of descent and alienation of remainders, &c.* In New York, Michigan, Minnesota, and Wisconsin, expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession.[5] In Massachusetts and in Maine, when any contingent remainder, executory devise, or other estate in expectancy, is so granted or limited to any person, that, in case of his death before the happening of the contingency, the estate would descend to his heirs in fee-simple, such person may, before the happening of the contingency, sell, assign, or devise the premises, subject to the contingency;[6] and, in addition, where lands are held by one person for life, with a vested remainder in tail to another, the tenant and remainder-man may together convey the same in fee-simple.[7] In New Jersey, any person may devise, convey, assign, or charge by deed, any contingency or executory interest to which he is entitled, except any expectancy he may have as heir of a living person, or any interest to which he may become entitled under any deed to be thereafter executed, or under the will of any living person.[8]

[1] N. Y. Rev. Stat. 5th. ed. vol. 3, p. 13; Stat. at Large, vol. 1, p. 674, § 35; Mich. Comp. Laws, 1857, c. 85, §§ 32–34; 1871, c. 147, §§ 32–32; Minn. Comp. Stat. 1859. c. 31, §§ 32–34; Stat. at Large, 1873, c. 32; Wis. Rev. Stat. 1858, c. 83, §§ 32–34.

[2] N. Y. Rev. Stat. 5th ed. vol. 3, p. 13; Stat. at Large, vol. 1, p. 674, § 31; Tate, Dig. Va. Laws, 1841, p. 336; Code, 1873, c. 119, § 8.

[3] Mass. Gen. Stat. c. 91, § 12.

[4] Dig. Ark. Stat. c. 56, § 2; Cal. Comp. Laws, 189, § 11; Civ. Code, 1872, p. 267, § 1403; Hotchk. Ga. Stat. 333, § 35; Walk. Am. Law, 333; Mo. Rev. Stat. c. 32, § 9; 1872, c. 140, § 8; Wis. Rev. Stat. c. 83, § 30.

[5] N. Y. Rev. Stat. 5th ed. vol. 3, p. 13; Stat. at Large, vol. 1, p. 674, § 35; Mich. Comp. Laws, 1857, c. 88, § 35; 1871, c. 147, § 3; Minn. Comp. Stat. 1859; c. 31. § 35; Stat. at Large, 1873, c. 32, § 35; Wis. Rev. Stat. 1858, c. 83, § 35.

[6] Mass. Gen. Stat. c. 90, § 87; Me. Rev. Stat. 1857, c. 73, § 3; 1871, c. 73, § 3.

[7] Mass. Gen. Stat. c. 89, § 5; Me. Rev. Stat. 1857, c. 73, § 4; 1871, c. 73, § 4

[8] Nix. Dig. N. J. Laws, p. 126; 1868, p. 149, art. 32.

SECTION VIII.

ESTATES WITHIN THE RULE IN SHELLEY'S CASE.

1. What limitations come within this rule.
2, 3. Origin and theory of the rule.
4. Rule applies, wherever by one act an estate goes to one and his heirs.
5. If remainder is limited by a separate instrument, not within the rule.
6. Limitation to the heirs of A gives A no interest.
7. The first estate limited must be a freehold.
8. Limitation of remainder must be to heirs of the first taker.
9. Rule applies though estates interpose between the first and remainder.
10. Rule applies to equitable and trust estates.
11. It applies though there be a trust as to one of two legal estates.
12. He to whom the first estate is limited may convey the fee.
13. The rule applies to the remainder, and not to the particular estate.
14. The rule imperative in its character.
15. Test whether a limitation is within the rule.
16. Limitation to son or sons, &c., not within the rule.
17. In what States the rule applies, and in what not.

1. THERE remains to be considered a pretty large class of estates, which, in England and in many of the United States, come within what is called the Rule in Shelley's Case, [*268] the peculiarity * of which is, that, while in form the estate has two parts, a particular one for life, with a contingent remainder to the heirs of the tenant who takes the particular estate, it is constructively a single estate of inheritance in the first taker. The form of limitation of such estates is to the grantee or devisee for life, and after his death to his heirs or the heirs of his body, either mediately or immediately, both estates being created by the same deed or devise. This rule, instead of regarding a part of the entire estate as in the ancestor, and a part in his heirs, considers the entire estate as being in him alone; that the intent in creating it was to have it go in a certain line of succession, and, if the first taker died intestate, his heirs should take by descent from him, and not as purchasers under the original limitation.[1]

2. It will be seen hereafter, that, by the statutes of several States, such a limitation as is above described is declared to

[1] Tud Lead. Cas. 482; Wms. Real Prop. 211.

be what it purports to be in terms, — a contingent remainder in the heirs. But from a period in the history of the English law anterior to that when contingent remainders were first recognized as legal interests, and too early to fix its precise date, it has been a rule of the common law, not merely of construction, but of imperative obligation, that if an estate is limited to one for life, and by the same gift or conveyance it is limited to his heirs in fee or in tail, the word "heirs" is a word of limitation of his, the first taker's, estate, and that *heirs* under such a deed or gift would have no greater interest or right than the heirs of any grantee in fee where an estate is given generally to him and his heirs.[1]

3. This rule takes its name from an early case reported in Coke's Reports, as Shelley's, in which it was first authoritatively and formally declared, though it was then an ancient dogma of common law.[2] Various theories have been suggested as furnishing a reason for this rule in the first place. One is, that it was adopted in order to prevent the lord from being deprived * of his wardship by allowing the heir [*269] to take as purchaser instead of by descent.[3] Another traces it to the same principle which applied originally to "heirs" when used in a conveyance. It was at first understood, that, in case of such a limitation, the estate was in fact to go to the heirs of the grantee named; that though he had a right to enjoy it during life, he had no right to cut off the descent by alienation; and that when, therefore, the word "heirs," in the progress of estates, came to be regarded as a mere term of limitation, giving the grantee a complete ownership, with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and, after his death, to his heirs, the effect at common law being the same in both forms of limitation.[4] Whether, after a limi-

[1] Wms. Real Prop. 218.

[2] Shelley's case, 1 Rep. 94; Wms. Real Prop. 209. Judge Blackstone traces it to a case determined in the 18th Edw. II. A. D. 1325 (see Hargr. Law Tracts, 568); whereas Shelley's case was not decided till 23 Eliz. A. D. 1581.

[3] Watk. Conv. 106, Coote's note.

[4] Wms. Real Prop. 209-211; 1 Prest. Est. 306; Tud. Lead. Cas. 482. See Hargr. Law Tracts, 573.

tation to one for life, the limitation over was to his heirs generally, or to the heirs of his body, merely affected the form by which he could alienate the land, in the one case by feofment, in the other by recovery.[1]

4. The reason thus presented defines the limits of the rule, and furnishes a clew to determine whether any given case is within the rule or not. As a general proposition, wherever there is a freehold in an ancestor, and a remainder to his heirs, limited and created by the same instrument, it is the same as if the estate had been limited to the ancestor and his heirs.[2] Thus, where the devise is to the first taker expressly for life, with a limitation to his heirs of his body, it creates an estate-tail in the first taker. Nor would it make any difference, that, in case of default of issue, it is to go to a brother, since the failure of issue is not definite, and it is contingent when it will fail.[3]

5. It is indispensable that the limitations should be by one and the same instrument, though it would seem to be sufficient that the instrument which limited the estate for life contained a power of appointment which should be executed to the heirs of the same person.[4] But when an estate for life only is given, followed by a general power of appointment, and on failure to appoint, then to children or special heirs, the power to appoint will not enlarge the estate of the life-tenant to a fee or fee-tail, and the children, or special heirs as they are termed, take by purchase, and not by descent. It is otherwise, where, upon failure to appoint, the remainder is to the "heirs" of the life-tenant.[5] Where, therefore, one by deed granted to his son an estate for life, and afterwards gave the reversion by devise to the heirs, or the heirs of the [*270] body of the son, it * was held, that the son only took a life-estate, and that his heirs took by purchase.[6]

[1] Wms. Real Prop. 209–211. See Hargr. Law Tracts, 564.

[2] 2 Flint, Real Prop. 131; Tud. Lead. Cas. 483; Wms. Real Prop. 211; Webster *v.* Cooper, 14 How. 500.

[3] Ogden's Appeal, 70 Penn. St. 509.

[4] Tud. Lead. Cas. 483; Watk. Conv. 107, Coote's note; Watk. Descents, 2d ed. 236; Co. Lit. 299 b, note 261; 1 Prest. Est. 324.

[5] Yarnal's Appeal, 70 Penn. St. 342; Dodson *v.* Ball, 60 Penn. St. 497.

[6] Moore *v.* Parker, 1 Ld. Raym. 37; Doe *v.* Fonnereau, Dougl. 508; Co. Lit. 299 b, Butler's note, 261; Adams *v.* Guerard, 29 Ga. 675.

But a will and a codicil, it seems, are considered as one instrument in their effect upon such a limitation.[1]

6. If an estate be limited to the heirs of A, A himself takes nothing, and his heirs take as purchasers, being merely designated as persons by the term "heirs." Such an estate is not within the rule.[2]

7. The first estate limited must be a freehold created either expressly or by implication. In either form it will be sufficient. Thus, where A covenanted to stand seised to the use of his heirs male, he retained by implication an estate for life, which, united with this estate to his heirs male, gave him a fee-tail.[3] But a feofment to the use of A for life, remainder to B, if A refuses to accept, B takes the estate presently. But if this had been by way of covenant, B would not take it until A's death: the estate in the mean time vests in the covenantor, because he has not parted with the possession, and therefore he will have the use.[4]

8. In the next place, the subsequent limitation to the heirs must be to the heirs of the ancestor who takes the particular estate. Thus, where the estate was limited to the wife for life, remainder to the heirs of the bodies of the husband and wife, the freehold being in the wife alone, the limitation over would be a remainder, and their heirs would take as purchasers;[5] whereas, had the first limitation been to the husband and wife, with remainder to the heirs of their bodies, the heirs would take by descent.[6] And an estate to A, B, and C, for their respective lives, and after their deaths to the next lawful heir of A, created a fee-simple in A; and the courts, in the case supposed, point out the distinction between this and Archer's case, where the estate was to A for life, remainder to his *heir* and the heirs male of his *heir*, where A took an estate for life only, and the heir took a contingent remainder as purchaser.[7]

[1] Hayes *v.* Foorde, 2 W. Bl. 698; Tud. Lead. Cas. 484; Wms. Real Prop. 211, note.

[2] Wms. Real Prop. 216.

[3] Pibus *v.* Mitford, 1 Ventr. 372; Watk. Descents, 2d. ed. 242; Tud. Lead. Cas. 486.

[4] Pybus *v.* Mitford, 2 Lev. 77.

[5] Watk. Descents, 2d ed. 241.

[6] Watk. Descents, 2d ed. 241; Webster *v.* Cooper, 14 How. 500.

[7] Fuller *v.* Chamier, L. R. 2 Eq. Cas. 682, 686; Archer's case, 1 Co. 66 b.

9. But it is not necessary that the limitation to the heirs should be enjoyed immediately upon the death of the first taker. There may be any number of intermediate estates interposed between that of the first taker and the enjoyment of the estate in possession which is limited to the heirs. Nor does the length of these affect the limitation, if no one of them is a fee-simple.[1] Nor will it have any effect to exclude the rule, that the remainder cannot by possibility vest as a remainder in the lifetime of the ancestor, as where the limitation was to A and * B and the heirs of him who should die first. So if the remainder be limited on a contingency which does not happen in the ancestor's lifetime, nevertheless the heirs will take by descent.[2] The mere circumstance that the remainder was contingent does not prevent the operation of the rule the moment the remainder vests. Thus, an estate limited to A for life, and if A survives B, then to his heirs, would be a contingent remainder in A, depending upon his surviving B. If he does, his estate becomes at once vested, and his term for life merges in the inheritance.[3]

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10. It was stated in the chapter on Trust Estates, that the rule in Shelley's case applies to equitable as well as to legal estates in the case of executed trusts.[4] But there are certain limitations of this application, and among them is the requirement, that the two estates, the freehold and the remainder, should both be legal, or both equitable.[5] But where one is legal, and the other equitable, the rule does not apply, and the heirs take as purchasers.[6] And if the trusts are executory, such as arise, for instance, under a marriage settlement, they will not be held to come within the rule where such is not the intention of the parties.[7]

[1] Watk. Descents, 2d ed. 246; Wms. Real Prop. 212, 213.

[2] Watk. Conv. 107, Coote's note; Watk. Descents, 2d ed. 247.

[3] 2 Flint, Real Prop. 129.

[4] *Ante*, p. *186.

[5] Watk. Conv. 107, Coote's note.

[6] Tud. Lead. Cas. 484; Watk. Descents, 2d ed. 238; Silvester *v.* Wilson, 2 T. R. 444; Doe *v.* Ironmonger, 3 East, 533; Adams *v.* Adams, 6 Q. B. 860; Ward *v.* Amory, 1 Curtis, C. C. 419.

[7] 6 Cruise, Dig. 307; Watk. Conv. 109, Coote's note; Jones *v.* Laughton, 1 Eq. Cas. Abr. 392; *ante*, p. *186.

11. It seems, that, where both the estates are legal, the fact that a trust is attached to one of them will not prevent the rule in Shelley's case from applying.[1]

12. As a consequence from the foregoing principles, whoever has a freehold, which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitations as may have been created between his freehold and the inheritance limited to his heirs.[2] Thus, where the limitation is to A * for life, and after his death to [*272] B for life, and after his decease to the heirs of A, A practically has two estates,— one in possession, the other in remainder ; the first for life, the other in fee, divided by the estate to B. And if B were to die in the life of A, his life-estate would merge, and he would at once become the unlimited tenant in fee of the estate.[3] Instead of the intermediate estate to B being for life, it might be to him in tail-male, and, upon default of issue, to the heirs of A, and still A would take an estate for life with a fee-simple in remainder expectant upon the determination of the estate-tail in B. So an estate may be limited to A and the heirs male of his body, and, in default of such heirs, to the heirs female of his body, where, if his heirs female take upon failure of heirs male, they do so as heirs of A, and not as purchasers.[4] The word "heirs," in these and like cases, is a word of limitation of the estate which the ancestor takes.[5] It would make no difference though the estate of A were a defeasible one, and a second estate were limited between the estates of A and that of A's heirs to take effect upon its being defeated. Thus, where the estate was for life to A, a widow, provided she should remain unmarried, and, after her marriage, to B during her life, and, after her death, to her heirs ; in this case A would practically have a fee-simple, subject only to B's remainder dependent upon her marrying again. She might accordingly convey the estate, subject only to B's contingent interest.[6]

[1] Tud. Lead. Cas. 484, cites Douglas *v.* Congreve, 1 Beav. 59, s. c. 4 Bing. N. C. 1.

[2] Wms. Real Prop. 213.

[3] Wms. Real Prop. 212, 213.

[4] Wms. Real Prop. 214 ; 1 Prest. Est. 306.

[5] Wms. Real Prop. 215.

[6] Wms. Real Prop. 216 ; Tud. Lead. Cas. 486

13. While it is the remainder and not the particular estate upon which the rule in Shelley's case operates in these and like cases, it nevertheless is an indispensable prerequsite, that the particular estate should be one of freehold, in order to give vitality to its action at all.[1]

14. But wherever the rule does apply, it is, as a rule of the common law, so imperative, that though there be an [*273] express * declaration that the ancestor shall only have a life-estate, it will not defeat its union with the subsequent limitation to his heirs.[2] So, though the limitation be accompanied by a declaration to the effect that the heirs shall take as purchasers, or is made to the heirs of the first taker and their heirs,[3] or where the estate is to A for life, and, after his death, to the heirs of his body, to share as tenants in common, or to be equally divided between them, it comes within the rule.

"Heirs of the body" means, in legal phrase, one person at a time, but includes all the posterity of the donee in succession. The general intent when thus expressed shall not be defeated by an expression of a particular intent, as to how that general intent shall be carried out, if both cannot take effect.[4] But where the course of descent is added by the superadded words, as where a limitation is made to A for life, and, after his decease, to his heirs, and their heirs female of their bodies, it becomes requisite that the heirs take as purchasers, in order to give effect to the limitation to the heirs female, &c. And consequently the rule in Shelley's case will not be applicable.[5]

15. The test, as given by Mr. Hargrave in such and similar cases, is, "whether the party entailing means to build a succession of heirs on the estate of the tenant for life." "If he does, then he (the judge) should apply the rule, even though

[1] 2 Flint, Real Prop. 130.

[2] Tud. Lead. Cas. 488; Perrin *v.* Blake, 1 W. Bl. 672.

[3] Tud. Lead. Cas. 489; Watk. Conv. 108, Coote's note; Hargr. Law Tracts, 562; Toller *v.* Attwood, 15 Q. B. 929.

[4] Watk. Conv. 108, Coote's note; Tud. Lead. Cas. 499; Jesson *v.* Doe, 2 Bligh, 1, overruling Doe *v.* Goffe, 4 East, 668; Doe *v.* Harvey, 4 B. & C. 610; Doebler's Appeal, 64 Penn. St. 15; Klappner *v.* Laverty, 70 Penn. St. 73.

[5] Tud. Lead. Cas. 493, *vid.* McCullough *v.* Gliddon, 33 Ala. 208.

the party should express in his will that the rule should not be applied, and that the remainder to the heirs of the tenant for life should operate by purchase." [1]

16. But where the limitation of the remainder is to a *son* or *sons*, or to *children* or *issue*, or to an *heir* or *heirs*, of him to whom the first estate for life is limited, if the term *heirs* is clearly intended as a *descriptio personæ*, the individual or persons thus designated take as purchasers, and do not come * within the rule under consideration.[2] If, [*274] however, the term made use of in the limitation is "son" or "child," and it is used in the sense of *heirs*, and not as a *designatio personæ*, but comprehending a class to take by inheritance, it is to be taken as a term of limitation, and accordingly brings the case within the rule in Shelley's case. So it is with the word "issue." The context in these cases may be resorted to, to get at the sense in which the term or terms are used. And if, as thus construed, heirs in the technical sense are intended, the case would come within the rule.[3] These points, having been the subject of consideration in several recent cases, may justify adding to what has been said, what might otherwise seem to be little more than a repetition. Thus the words "child or children" are, in their usual sense, words of *purchase*, and are always so regarded, unless the testator has unmistakably used them as descriptive of the extent of the estate given, and not to designate the donees. But they may be used as words of *limitation*.[4] On the other hand, "heirs" may sometimes mean the same as *child* or *children*. But the testator's intent to use it thus must be clear, and something more than implication; otherwise it is a word of

[1] Hargr. Law Tracts, 460.

[2] Tud. Lead. Cas. 493; 2 Flint, Real Prop. 128; Watk. Conv. 108, Coote's note; Poole *v.* Poole, 3 Bos. & P. 620; White *v.* Collins, Com. 289; Cursham *v.* Newland, 2 Bing. N. C. 58, s. c. 4 M. & W. 101; Greenwood *v.* Rothwell, 5 Mann. & G. 628; Slater *v.* Dangerfield, 15 M. & W. 263, and note to Am. ed.; Abbott *v.* Jenkins, 10 Serg. & R. 296; Webster *v.* Cooper, 14 How. 500; Tyler *v.* Moore, 42 Penn. St. 374, 388; Adams *v.* Ross, 1 Vroom, 512; Ford *v.* Flint, 40 Vt. 394.

[3] 2 Flint, Real Prop. 128; Tud. Lead. Cas. 496; Robinson *v.* Robinson, 1 Burr. 38; Doe *v.* Davies, 4 B. & Ad. 43; Shaw *v.* Weigh, Strange, 798; Lees *v.* Mosley, 1 Younge & C. 589.

[4] Haldeman *v.* Haldeman, 40 Penn. St. 35; Hayes, Real Estate, Rules, &c., 30–35.

limitation.[1] In a will, a testator may use the word "children" as meaning *heirs of the body;* possibly a grantor may do this, but his intention must be clearly shown. Words of purchase will be treated as such until it has been unmistakably shown that the grantor designed to use them in a different sense.[2] In applying the rule in Shelley's case, where the estate is created by will, the words *heirs*, or *heirs of the body*, most frequently express the relation in which the second taker must stand to the first. But any other words will answer quite as well, such as next of kin, sons, daughters, issue, children, or descendants, if they appear to be equivalent; and the most appropriate words will not answer, if used in a special and inappropriate sense. If, therefore, the remainder is to persons standing in the relation of general or special heirs of the tenant for life, the law presumes that they are to take as heirs, unless it unequivocally appears that individuals other than persons who are to take simply as heirs are intended.[3] It declares inexorably, that, where the ancestor takes a preceding freehold, by the same instrument a remainder shall not be limited to heirs, *qua* heirs, as purchasers.[4] A question of this kind arose in New Jersey in relation to a grant which was to A for life, and, at her death, to her children. In the court below, it was held to be construed to be to her and her heirs;[5] but in the Court of Errors it was decided to be a life-estate only in the first taker.[6] And it may be assumed, as a general proposition, that a devise to *children* does not embrace grandchildren.[7] On the other hand, "issue," in a will, is either a word of *purchase* or *inheritance*, as will best answer the intention of the devisor. In case of a deed, it is always taken as a word of purchase.[8] And when used as a word of purchase in a deed or will, it is synonymous and coextensive with the

[1] Criswell's Appeal, 41 Penn. St. 290. See Macumber *v.* Bradley, 28 Conn. 445; Jones *v.* Miller, 13 Ind. 337; Flint *v.* Steadman, 36 Vt. 210.

[2] Tyler *v.* Moore, 42 Penn. St. 389; Adams *v.* Ross, 1 Vroom, 512.

[3] Price *v.* Taylor, 28 Penn. St. 102, 103; Doe *v.* Charlton, 1 M. & G. 429.

[4] Doebler's Appeal, 64 Penn. St. 17; Klappner *v.* Laverty, 70 Penn. St. 73.

[5] Ross *v.* Adams, 4 Dutch. 172. [6] Adams *v.* Ross, 1 Vroom, 512.

[7] Sheets *v.* Grubbs, 4 Met. (Ky.) 341; Churchill *v.* Churchill, 2 Met. (Ky.) 466.

[8] Doe *v.* Collis, 4 T. R. 299; Price *v.* Sisson, 13 N. J. 177; Taylor *v.* Taylor, 63 Penn. St. 483.

term "descendants," and includes all persons who answer that description.[1]

17. As the rule in Shelley's case is a part of the common law of every State where it has not been repealed by statute,[2] little need be added upon this subject in connection with its application to American law. Mr. Rawle, in his note to Williams' Treatise on Real Property,[3] states that the rule in Shelley's case prevails in Maryland, Georgia, Tennessee, and Pennsylvania, with the exception, that if the limitation would, at common law, create an estate-tail, it creates an estate in fee-simple here.[4] And it has been accordingly held, that a devise to A in trust for the use of his heirs at law, he to have the estate during his life, was held to be a devise in fee to A.[5] From the number of the States, as shown by note 2, p. 607, in which this rule has been partially or wholly abolished, it is obvious that the prevailing sentiment of the country is rather against its expediency as a rule of law. But Gibson, C. J., has maintained its pertinency and propriety in a masterly opinion given by him in Hillman *v.* Bouslaugh, in which he says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system, — an artificial one, it is true, but still a system, and a complete one. It happily falls in with the current of our policy. By turning a limitation for life, with remainder to the heirs of the body, into an estate-tail, it is the handmaid not only of Taltarum's case, but of our statute for barring entails by a deed acknowledged in court; and, where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery." "It is admitted that the rule subverts a particular intention in perhaps every instance; but it is an intention which the law cannot indulge in consistently with the testator's general plan, and which is necessarily

[1] Price *v.* Sisson, *sup.*, and cases there cited; Haldeman *v.* Haldeman, *sup.*

[2] Powell *v.* Brandon, 24 Miss. 353, 364; Baker *v.* Scott, 62 Ill. 86; Brislain *v.* Wilson, 63 Ill. 175, "heirs" is a word of limitation.

[3] Wms. Real Prop. 241, Rawle's note.

[4] Price *v.* Taylor, 28 Penn. St. 102, 103; Steiner *v.* Kolb, 57 Penn. St. 123; Quillman *v.* Custer, 57 Penn. St. 125.

[5] Kepple's Appeal, 53 Penn. St. 211.

subordinate to it. It is an intention to create an inalienable estate-tail in the first donee, and to invert the rule of interpretation by making the general intention subservient to the particular one." "The rule is too intimately connected with the doctrine of estates to be separated from it, without breaking the ligaments of property." In the case in which this language was used, the question was as to the construction of a grant to a married woman during her natural life, and after her decease to the heirs of her body, and to them and their heirs and assigns; and it was held, under the rule in Shelley's case, to be an estate-tail in the first taker, and, at her decease, to descend to her oldest son as heir at common law.[1] A similar doctrine was maintained in a subsequent case in respect to a devise in very nearly the same terms as in the grant in the one above stated, and the rule is there again affirmed as a part of the law of that State.[2] The rule applies also in Texas[3] and Indiana.[4] In Rhode Island the rule is abolished in case of devises to one for life, and to the children or issue generally of such devisee. Such a devise vests the estate in the first taker for life; and, at his decease, in his children or issue generally. But where the devise is to one for life, and then to the devisee's heirs, the first taker takes a fee under the rule in Shelley's case.[5] If it is to devisee for life, and after his decease to his male heirs, it would create an estate-tail in the first taker, under the same rule.[6] So, where a wife had an estate conveyed to trustees for her sole use during her life, and, in default of appointment at her death, to be conveyed to her heirs at law, under this rule she took an equitable estate in fee-simple, and, in default of appointment at her death, it went to her heirs.[7] But a devise to one for life, and afterwards to his lawful issue, to them and

[1] 13 Penn. St. 344.

[2] George *v.* Morgan, 16 Penn. St. 95; Paxon *v.* Lefferts, 3 Rawle, 59; Carter *v.* M'Michael, 10 S. & R. 429; Kleppner *v.* Laverty, 70 Penn. St. 73.

[3] Hawkins *v.* Lee, 22 Texas, 547; Hancock *v.* Butler, 21 Texas, 804.

[4] Hull *v.* Beals, 23 Ind. 28; Siceloff *v.* Redman, 26 Ind. 251.

[5] Bullock *v.* Waterman St. Soc., 5 R. I. 273, 276; Moore *v.* Dimond, Ib. 127; Moore *v.* Weaver, 16 Gray, 307.

[6] Cooper *v.* Cooper, 6 R. I. 264; Manchester *v.* Durfee, 5 R. I. 549; Jillson *v.* Wilcox, 7 R. I. 518.

[7] Tillinghast *v.* Coggeshall, 7 R. I. 383.

their heirs, was held, under the statute of Rhode Island, to be an estate for life in the first taker, and a remainder in fee in his children when born.[1] By a recurrence to the statutes and decisions of the following States, it will be found that it has been abolished therein as a rule of law.[2]

[1] Williams *v.* Angell, 7 R. I. 145.

[2] *Alabama,* Code, 1867, § 1574. — *Connecticut,* Gen. Stat. 1866, p. 537, § 5; Goodrich *v.* Lambert, 10 Conn. 448. — *Kentucky,* Rev. Stat. 1852, c. 80, § 10; Williamson *v.* Williamson, 18 B. Mon. 329. — *Maine,* Rev. Stat. 1857, c. 73, § 6. — *Massachusetts,* Gen. Stat. c. 89, § 12, both in deeds and wills; Richardson *v.* Wheatland, 7 Met. 169, 172. An estate for life vests in the first taker, and a remainder in fee-simple in the heirs. — *Michigan,* Comp. Laws, 1857, c. 85, § 28. — *Minnesota,* Comp. Laws, 1859, c. 31, § 28. — *Mississippi.* The rule seems to be abolished as to lands. Powell *v.* Brandon, 24 Miss. 343, 366. — *Missouri,* Gen. Stat. 1866, c. 108, § 6. — *New Hampshire.* Abolished as to wills. Gen. Stat. 1867, c. 174, § 5; Dennett *v.* Dennett, 40 N. H. 500. — *New Jersey,* Stat. tit. 10, c. 2, § 10. The rule extends to devises of lands; Den *v.* Demarest, 1 N. J. 525. — *New York,* Rev. Stat. 4th ed. pt. 2, tit. 2, art. 1, § 28; Lalor, Real Prop. 96. Those who are heirs of the tenant for life at his death take by such limitation; Moore *v.* Littel, 40 Barb. 488. — *Ohio,* abolished as to wills. Rev. Stat. 1854, c. 122, § 53. — *Tennessee,* Code, 1858, § 2008. — *Virginia,* Code, 1849, c. 116, § 11. — *Wisconsin,* Rev. Stat. 1858, c. 83, § 28.

CHAPTER V.

CONTINGENT, SPRINGING, AND SHIFTING USES.

SECT. 1. Contingent Uses.
SECT. 2. Springing Uses.
SECT. 3. Shifting Uses.

SECTION I.

CONTINGENT USES.

1. Classification of future uses.
2. Uses limited as remainders.
3. A seisin necessary to sustain uses in way of remainders.
4. Of the seisin where the use is created by covenant to stand seised.
5. Of seisin in case of a use created by feofment.
6. Of *Scintilla Juris*.
7. Contingent uses, how far like contingent remainders.
8. A resulting freehold will sustain a contingent use.

1. IF the foregoing chapters upon Uses and Remainders have accomplished what was proposed by them, the reader will be prepared to understand the rules which apply to uses which are, by their limitation, to arise or be executed at a period subsequent to their creation. Mr. Sugden divides these into three classes, — future or contingent uses, springing uses, and shifting or secondary uses ; and to these it has seemed fit to devote a separate chapter in the arrangement of the topics of this work.

2. The first of these are, properly, uses limited to take effect as remainders ;[1] for remainders, whether vested or contingent, may be limited by way of use as well as at common law ; and, in this country, such is the mode in which they are ordinarily, if not always, limited.[2] This, of course, implies the

[1] Gilbert, Uses, Sugd. ed. 152, n.; 1 Prest. Abst. 105.
[2] 4 Kent, Com. 258.

existence of a particular estate upon which the remainder depends, created at the same time and by the same instrument as the remainder, as in case of remainders created at common law. In this respect they differ, as will be shown, from springing uses and executory devises; and courts always give to future contingent estates the character of remainders, wherever the * terms in which they are limited [*277] will admit of such a construction. In the language of Lord Mansfield, "it is perfectly clear and settled, that, where an estate can take effect as a remainder, it shall never be construed to be an executory devise or springing use." And it is stated by Mr. Sugden, that "it appears now to be well settled, that where an estate is limited previously to a future use, and the future use is limited by the way of remainder, it shall be subject to the rules of common law, and consequently, if the previous estate is not sufficient to support it, shall be void." [1]

3. It is hardly necessary to repeat here what these rules are, except that there is the same necessity of a freehold to precede and sustain a freehold contingent remainder, when limited by the way of use, as there is at common law. There must be in some one a seisin, ready to be executed to the use the moment the use vests by the happening of the contingency, in some known ascertained *cestui que use in esse*, or the remainder must fail.[2] The question whether there is such a seisin, and in whom it is in certain cases, has been previously discussed;[3] and its examination is now resumed for the purpose of illlustrating its bearing upon the subject under consideration.

4. To do this, an instance may be assumed of a contingent remainder limited by either of two different forms of conveyance which derive their validity from the statute of uses, covenant to stand seised, or feofment to use. In the first, it will be remembered, the conveyance takes effect without a trans-

[1] Goodtitle *v.* Billington, Dougl. 758; Gilbert, Uses, Sugd. ed. 165, n.; Co. Lit. 217; Adams *v.* Savage, 2 Ld. Raym. 854; Fearne, Cont. Rem. 284, and Butler's note; 2 Sharsw. Bl. Com. 175, note for American cases; Burt. Real Prop. § 797; 1 Prest. Abst. 108; Wilson, Uses, 47.

[2] Gilbert, Uses, Sugd. ed. 167, n., 286.

[3] *Ante*, p. *263

mutation of possession of the premises conveyed. In the other, such a transmutation takes place. Suppose, then, a person covenants to stand seised to the use of A for life, remainder to his first and other sons in tail, while he has no son, remainder to B in tail, remainder to the cove-
[*278] nantor in fee. Keeping in * mind the rule that there can be no use upon a use, it is not difficult to discover in these limitations all the requisite elements for giving effect to the several estates thereby created. The seisin, being in the covenantor, is in the first place executed in A, the tenant for life to whom the first use is limited; and as B is a known person *in esse*, the use in him, as a remainder, is vested and executed, whereby both A and B have a legal estate in them by force of the statute, — the one in possession, the other in remainder. But as the seisin in A cannot serve the use in the son of A, to whom the contingent remainder by way of use is limited, so as to give him a legal estate in remainder when he shall come *in esse*, such seisin is to be sought elsewhere, and is found in the covenantor himself, in whom the seisin originally was, and who has the reversion in fee of the legal estate.[1]

5. To illustrate the application of the principle requiring a seisin to be in some one to serve the use to cases of the creation by way of use of a contingent remainder by a feofment to use, lands were conveyed to one to the use of A for life, remainder to his first and other sons in tail, he then having no son, remainder to B in fee. The use, as in the preceding case, became executed in A and B, and the use to B was a vested remainder for the reasons before stated. But when the question was made as to the seisin which was to support the contingent remainder in the son of A, and to be executed and become, with the use when vested, a legal estate in him, the difficulty was to ascertain the person in whom it was to be found. It was said not to be in the feoffor, for he parted with his seisin when he made the feofment; it was said not to be in the feoffee, because the statute at once took the seisin from him and united it with the use in A; and it could not

[1] 3 Prest. Conv. 400.

be in A, for, as it had become united with his use as *cestui que use* for life, a use could not be limited upon a use in favor of the contingent remainder-man.[1]

6. A vast amount of speculation and ingenious subtlety has been expended by judges and writers to get at some clew by which to reconcile and explain this seeming legal solecism of a *seisin which no one can find, though [*279] existing somewhere, and both operative and efficient. By some the seisin was thought to be in a state of suspended animation, or, in technical phrase, that it was *in nubibus*, waiting for the occasion to arise when it should become active, in order to give effect to the limitations which depended upon it. Others thought, that although the statute drew out of the feoffees the seisin which passed to them by the feofment, and executed it with the use in the first taker of the life-estate, enough of seisin was left in him to serve the future contingent uses as they arose. To this shadowy something they gave the name of *scintilla juris*, — a topic which fills an important place in the early doctrine of future contingent estates.[2] A more rational view is taken of this subject by modern writers, especially Mr. Sugden and Mr. Hayes, whose notions are approved by Chancellor Kent and Mr. Coventry. The language of the former is: "The true construction of the statute appears to be, that upon a conveyance to uses operating by transmutation of possession, immediately after the first estate is executed, the releasees (feoffees) to uses are divested of the whole estate; the estates limited previously to the contingent uses take effect as legal estates; the contingent uses take effect as they arise, by force of and relation to the seisin of the releasees (feoffees) under the deed; and any vested remainders over take effect according to the deed, subject to open and let in the contingent uses." This, if established, would overthrow the fiction of *scintilla juris*, and with it the necessity of an actual entry to revive contingent uses, and would, in many other respects, place contingent uses on the

[1] Gilbert, Uses, Sugd. ed. 293–296.

[2] Brent's case, Dyer, 340; Chudleigh's case, 1 Rep. 120; Sugd. Pow. 20–48; 4 Kent, Com. 238–247; Gilbert, Uses, Sugd. ed. 296, note.

footing of contingent remainders.[1] Mr. Hayes uses this language: "This *scintilla* is a thing of which neither the statute nor the common law affords us an idea. It appears to be an invention to get rid of an assumption." "But though we may be at a loss to discover how the seisin can return, much less partially return, to the feoffees, &c., for the purpose [*280] of serving a contingent use, * there is no difficulty in supposing it may retain the impression of that use, and be transferred, subject to all the confidences which attached upon it during its momentary residence in the feoffees. The seisin is presently executed in the persons *in esse* to receive it, not subject to a possibility of reverting to the source from which it was derived, to be again attracted thence, but with *a capacity*, acquired in its passage from the feoffees, of transmission through all the contingent uses. Thus the contingent uses, when they arise, draw their legal clothings from the vested uses, which, in supplying the call, merely obey the original impulse communicated to the common seisin, and fulfil the condition of their vesting."[2] The chief difficulty in undertaking to explain a matter so abstract as this must necessarily be, is to find terms or analogies which are competent to convey a definite idea to the reader. But it is hoped that the foregoing extracts will serve for a matter of so little practical moment as this must necessarily be.

7. Mr. Sugden affirms that "future or contingent uses are placed on exactly the same footing with contingent remainders."[3] It will therefore be unnecessary to dwell further upon this part of the subject than merely to repeat that there must be a particular estate of freehold to support a contingent freehold remainder by the way of use, which remainder must vest and take effect, at the farthest, at the instant of the determination of the particular estate.[4] Consequently, if the previous estate is not sufficient to support it, such remainder

[1] Gilbert, Uses, Sugd. ed. 297, n.; 4 Kent, Com. 244; Watk. Conv. 244, Coventry's note.

[2] Hayes, Real Est. 166; Fearne, Cont. Rem. 295, and Butler's note; Watk. Conv. 244, n. See also Cornish, Uses, 137-140.

[3] Gilbert, Uses, Sugd. ed. 177, n.

[4] Gilbert, Uses, Sugd. ed. 164, 165, n.; 2 Cruise, Dig. 261.

will be void. Thus, where there was a limitation to trustees or feoffees in fee to the use of A for ninety-nine years, if he so long lived, remainder to the use of the heirs male of B in tail, it was held to be a void remainder, as the preceding estate in A was not a freehold.[1] In the case of State *v.* Trask, a deed was made, to certain individuals who had subscribed a fund for the erection of a court-house, of a parcel of land to be occupied and improved for that purpose, if the county would accept it as the site of the court-house; otherwise to be and remain in the custody of the grantees for their mutual benefit. The court held that the grantees took the estate in trust, in the first instance, for the public; and, in case that use failed, then, and upon that contingency, to the use of themselves, &c. "It is not," say they, "the case of a use upon a use, but rather a case of contingent or alternative uses, and one of very frequent occurrence in the law." And although this case is cited here as being sufficiently related to the class of contingent uses, it is obvious, that, if the first limitation took effect at all, the second could only do so as a shifting use.[2]

8. It will be sufficient if this prior estate of freehold is one which results to the grantor, if it be by the same instrument * which created the remainder. And if the [*281] remainder be limited by way of use to several persons, and one of them become capable of taking before another, it will vest in the person first becoming thus capable, subject to be divested, as to the proportion of the persons afterwards becoming capable, before the determination of the particular estate. And notwithstanding the different times of vesting, they will take jointly.[3]

[1] Adams *v.* Savage, Salk. 679; s. c. 2 Ld. Raym. 854; Wilson, Uses, 7; Gilbert, Uses, Sugd. ed. 167, n.

[2] State *v.* Trask, 6 Vt. 355, 363.

[3] 2 Cruise, Dig. 261; Davies *v.* Speed, Salk. 675; Sussex *v.* Temple, 1 Ld. Raym. 311; Dingley *v.* Dingley, 5 Mass. 535; Nichols *v.* Denny, 37 Miss. 59; Carroll *v.* Hancock, 3 Jones, L. 471.

SECTION II.

SPRINGING USES.

1. What a springing use is.
2. Such a use may be certain or contingent.
3. No particular estate required to support it.
4. How such uses arise under the statute of uses.
5. How far a springing use is a shifting one. — Of the seisin.
6. A springing use must be independent of any prior estate.
7. Springing and shifting uses answer to executory devises.
8. Future uses always construed remainders if possible.

1. A SPRINGING use is one limited to arise on a future event where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor, or remains in him in the mean time.[1] In the words of Lord St. Leonards, "If the use be contingent, the contingency is a thing resting in confidence; and when the time arrives for that contingency to take effect, the statute executes that use or confidence, and gives the legal estate. Before it vests it is a limitation, and it is a limitation of the use."[2]

2. A springing use is not one necessarily contingent. It may arise upon a future event, either certain or contingent;[3] or, as defined by a writer of high authority, a springing use is "a future use either vested or contingent, limited to arise without any preceding limitation."[4]

3. It differs, therefore, from a remainder, in not requiring any other particular estate to sustain it than the use resulting to the one who creates it, intermediate between its creation and the subsequent taking effect of the springing use. Thus, a feofment to A and his heirs, to the use of B and his heirs after his marriage with C, is an instance of a springing use

[1] Gilbert, Uses, Sugd. ed. 153, n.; 2 Crabb, Real Prop. 498; 2 Cruise, Dig. 263; Cornish, Uses, 91; Wilson, Uses, 8; 2 Sharsw. Bl. Com. 334, n. Springing and shifting uses are often spoken of by legal writers as synonymous or convertible terms. They are not intended to be so used in this chapter.

[2] Egerton *v.* Brownlow, 4 H. L. Cas. 206.

[3] Watk. Conv. 243, Coventry's note; Weale *v.* Lower, Pollexf. 65.

[4] Cornish, Uses, 91; Wilson, Uses. 8.

raised in favor of B, which is contingent on his marrying C.[1] On the other * hand, while, upon a conveyance to A and his heirs to the use of B and his heirs from and after next Michaelmas, the use to B is a future and springing one, it is not contingent; and, till the time fixed for its taking effect, it results to the grantor.[2] [*282]

4. Mutton's case, above cited, was the first in which a future and springing use, without any preceding estate to support it, was held to be a valid limitation. This was in the 10th of Elizabeth, A. D. 1568, thirty-two years after the passage of the statute of uses. As the whole doctrine of such uses depends upon the construction of that statute, it may be well to recur to the law as to uses as it stood before the passage of the act. In treating of this in a former chapter,[3] it was shown that the feoffor, when he made the feofment, might declare the use to which the feoffee should hold it, either in his own favor or in favor of another, and might in the latter case declare that the use should take effect at a future time, in which case the use resulted to himself till the time designated. The statute of uses, among other things, provided in effect that the *cestui que use* should have the legal estate created by the union of the seisin with the use in him, "after such quality, manner, form, and condition" as he had before, in or to the use, &c., that was in him. The courts seized upon this expression to give validity and effect to conveyances under the statute, which would have been invalid at common law; and among other things, because before the statute a use might have been created to take effect *in futuro*, though for life or in fee, they held that a legal estate might, by means of uses, be created to commence *in futuro*, though it was a freehold.[4] The legal estate in the end, when it did take effect, was created by the seisin being executed to the use. But this execution was postponed till the happening of the event or arrival of the time prescribed in its original limi-

[1] Cornish, Uses, 9, cites Mutton's case, Dyer, 274; s. c. F. Moore, 376, 517.

[2] Watk. Conv. 243, Coventry's note; Weale *v.* Lower, Pollexf. 65.

[3] *Ante*, Chap. II. § 1.

[4] 3 Report, Eng. Com. Real Prop. 27, 28; Wms. Real Prop. 242; Burt. Real Prop. § 154.

tation. This seisin remained in the person creating the future use till the springing use arose, and was then executed to this use by the statute.[1]

[*283] *5. In one sense, therefore, in every such case a springing use is a shifting one, being a substitute for, and determining that which has remained in or resulted to the person who held the legal estate when it was first created. The cases above supposed, where the seisin which is to serve the use when it springs up remains in the person who creates the future use, are those where the conveyance is without transmutation of possession. And therefore it is said a bargain and sale to the use of J. D., after the death of J. S. without issue if he die within twenty years, would be good. But where the conveyance is by feofment, lease and release, and the like, which operate by transmutation of possession, a springing use may be limited out of the seisin in the feoffee. Thus, upon a feofment to A and his heirs, to the use of B and his heirs at the death of J. S., the use in the mean time would result to the feoffor until the springing use took effect by the death of J. S., when the seisin in the feoffee would serve and be executed to the use of B.[2]

6. To create a good springing use, it must be limited at once independently of any preceding estate, and not by way of remainder; for, if it be in the form of a remainder, it shall be construed a future or contingent, and not a springing use, and will be subject to the laws which govern contingent and vested remainders.[3] Hale, C. J., thus explains the difference between the two: A feofment to the use of A for life, and, after the death of A and B, to C in fee, is a contingent remainder to C; but a feofment to the use of C in fee, after the death of A and B, is a springing use.[4]

7. Springing uses, and the same is true of shifting uses, answer in most respects to executory devises; the difference

[1] Gilbert, Uses, Sugd. ed. 161, n.; Shapleigh *v.* Pilsbury, 1 Me. 271, 290; Wyman *v.* Brown, 50 Me. 156.

[2] Gilbert, Uses, Sugd. ed. 163, n.; Shapleigh *v.* Pilsbury, 1 Me. 271; 2 Cruise, Dig. 264; Ormond's case, Hob. 348; 4 Kent, 298; Jackson *v.* Dunsbagh, 1 Johns. Cas. 96.

[3] Gilbert, Uses, Sugd. ed. 176, n.

[4] Weale *v.* Lower, Pollexf. 65; 2 Fearne, Cont. Rem. Smith's ed. § 117.

being that the one is created by deed, the other by last will.[1]

8. It will be necessary, therefore, in this chapter, to do little * more, upon some parts of the subject, than [*284] to refer the reader to the subsequent chapter which treats of Executory Devises. And it may be remarked, that, as will hereafter appear, as courts never construe a limitation by will to be an executory devise, where it can take effect as a remainder, so, where by possibility a limitation by deed by way of use can take effect as a remainder, courts never construe it to be a springing or shifting use. Therefore, wherever future estates are so limited as regularly to wait for the expiration of prior estates, and then to take effect, they are remainders, and cannot be deprived of that character. But a use limited by way of remainder will not be construed into a springing use, although actually void in its creation, if not so considered.[2]

[1] Fearne, Cont. Rem. 385, Butler's note. Mr. Wilson published a "Treatise on Springing Uses and other Limitations by Deed corresponding with Executory Devises, according to the Arrangement of Mr. Fearne's Essay."

[2] Carwardine *v.* Carwardine, 1 Eden, 34; Cole *v.* Sewell, 4 Dru. & Warr. 27; Goodtitle *v.* Billington, Doug. 753; Wilson, Uses, 5; Gilbert, Uses, Sugd. ed. 167, 172, 176; Wms. Real Prop. 245; Tud. Lead. Cas. 263; Southcote *v.* Stowell, 1 Mod. 238.

SECTION III.

SHIFTING USES.

1. Shifting uses defined.
2. How by the statute of uses a fee may be limited after a fee.
3. Examples of such limitations.
4. Example of a marriage settlement.
5. A seisin must be in some one to raise a shifting use.
6. Springing and shifting uses are executory interests.
7, 8. A future use may be limited after a prior estate, though not a remainder.
9. Distinction between shifting uses and conditional limitations.
10. Conditional limitations only arise by way of use or by devise.
11. Shifting uses applicable to chattel estates.
12. No remainder of a term for years.
13. Qualities and incidents of future uses.
14. Of restraining waste in case of future uses.
15. Shifting and springing uses not affected by change in prior estate.
16. Rule that a right of entry sustains contingent remainders and uses.
17. Illustrated in the case of Wegg *v.* Villers, Lord Coke's case.
18. Effect on a future use of barring a prior entail.
19. Shifting uses limited after estates-tail, not perpetuities.
20. No remoteness of vesting affects a contingent use.
21. Law of perpetuity same in shifting uses, &c., and in executory devises.
22. Law of New York as to suspending the power of alienation.

1. SHIFTING or secondary uses are such as take effect in derogation of some other estate, and are either limited expressly by the deed, or are allowed to be created by some person named in the deed.[1] In the case before cited, Lord St. Leonards uses this illustration: "What is there to prevent you from saying, if a certain event arises, I direct you to stand possessed of that estate, upon confidence, for A, B, C, and so on? But if a certain other event should happen, I then tell you that that confidence is to cease, and the trust is to cease, or the use, as we call it."[2] An example of a shifting use, as given by the courts, is a grant to proprietors of land who are incorporated on which it was intended to build a church, *habendum* to said proprietors, &c.; and to

[1] Gilbert, Uses, Sugd. ed. 152, n.; 1 Spence, Eq. Jur. 452; Cornish, Uses, 19; 2 Sharsw. Bl. Com. 334, n.

[2] Egerton *v.* Brownlow, 4 H. L. Cas. 209.

each and every person who may hereafter become the lawful owner and proprietor of a pew in said house to be built thereon by said proprietors, "the use would legally shift to those who should thereafterwards become pew-holders." [1]

2. By the common law, there could not be a limitation of a fee after or upon a fee; and a fee could only be defeated by the feoffor's taking advantage of the breach of some condition by an entry made, and regaining thereby the seisin to himself, since a stranger had no right to avail himself of such condition. But, as has heretofore been explained, before the statute of uses, the feoffor to use, when he parted with his legal estate and seisin to his feoffee, might provide for the estate being held to the use of one until a certain event should happen, and then * to another, though [*285] each of these limitations of the use should be in terms a fee; and, by the principle adopted in construing the statute of uses, the courts held that there might be a fee limited to take effect after a fee, by destroying the first and giving effect to the second by way of use, whereby the first estate is *ipso facto* determined, and the new estate brought into its place by the act of the law itself.[2]

3. This may be illustrated by what is said to have been the first case in which the doctrine of shifting uses was established. A feofment in fee was made to the use of W. and his heirs until A. paid £40 to W., and then to the use of A. and his heirs. The use to W. was in terms a fee; but it was made defeasible in favor of A., who, by performing a condition on his part, and not for any breach of a condition on the part of W., became entitled to the use to which the statute, it was held, annexed the seisin whereby his estate was perfected and the estate in W. defeated.[3] Another case was as follows: A limitation was made to J. S., a younger son in fee, provided that, if the eldest son died without issue, J. S. should, within six months after the death of the former, pay

[1] Second Cong. Society *v.* Waring, 24 Pick. 307; Packard *v.* Ames, 16 Gray, 328.

[2] 3 Report, Eng. Com. Real Prop. 27, 28; Wms. Real Prop. 242; Gilbert, Uses, Sugd. ed. 153, n.; Watk. Conv. 8th ed. 244; Cornish, Uses, 92, 94; Carpenter *v.* Smith, Pollexf. 78; Co. Lit. 271 b, note 231, § 3.

[3] 2 Cruise, Dig. 264, citing from Brooke, Abr.

£1,000 to his sister; and, on default of such payment, that the estate should go to the sister in fee. The eldest son died without issue; the sister died within six months; and on the omission of J. S. to pay the prescribed sum, the estate went to the sister's heirs.[1]

4. But perhaps the best illustration of the application of this doctrine may be afforded by the terms of an ordinary marriage settlement, in which it plays an important part. In this the limitation is to trustees, first to the use of A the settler and his heirs until the intended marriage takes place, and from and after such marriage to the uses agreed on, as, for instance, to the use of D, the intended husband, and his assigns for life, and so on to such other uses and upon [*286] such terms as may be * prescribed. Here the first estate to the settler was a fee; and if the marriage should never take place, there would be nothing ever to divest it: upon the happening of the marriage, however, the settler is at once divested of his estate, and a freehold takes effect in possession in D, — the seisin and possession, in other words, shifting from A to D, without any further act done by either party. Still, though the interest of D, until it takes effect, is a future one, and contingent in its nature, it is not a remainder; for no remainder can be limited after the expiration of a qualified fee, and such is the estate first limited to A the settler. And so the uses go on shifting from one to another from time to time, according to the terms of the original limitation of the estate in the settlement.[2] *

5. There is the same necessity of a seisin in some one other than the *cestui que use* in the case of a shifting, as there is in that of a springing use. And where the conveyance to such a use is by some mode in which there is no transmutation of possession, the seisin out of which the use is to arise remains in the original owner until the use comes

* Note. — The reader is referred to the Appendix for the form of a marriage settlement, showing the application of the above doctrine.

[1] Winchelsea *v.* Wentworth, 1 Vern. 402.

[2] Gilbert, Uses, Sugd. ed. 155, n.; Wms. Real Prop. 243; 2 Flint, Real Prop. 622; Carwardine *v.* Carwardine, 1 Eden, 34; Wilson, Uses, 5. In this case Lord Kenyon seems to use "springing" in the sense of "shifting" as above defined. Tud. Lead. Cas. 263.

in esse; and where there is a transmutation of possession, it arises out of the seisin of the feoffees or releasees, as in the case of springing uses.[1] There cannot be a shifting use on a shifting use.[2]

6. But with this attempt to distinguish, for purposes of definition, between springing and shifting uses, it will be found more convenient to treat of them under the general designation * of *executory interests* created [*287] under the statute of uses; that which is limited first, to arise at a future time, being a springing use, and that which is to arise as a secondary one after another, which it is to displace, being a shifting use.

7. There may be a good future use which is not a remainder, although limited after a preceding estate, if the latter is not capable, in its nature, of supporting a remainder. As, for instance, a limitation to the use of trustees for five hundred years, in trust to pay an annuity to T for life, remainder to the oldest son of T, he having none at the time, which was held a good limitation of a use in favor of the son of T, when born, though the estate which preceded it, being an estate for years, could not sustain it as a contingent remainder.[3]

8. So there may be such a use limited after an estate competent to sustain it as a remainder, but upon which it is not, in fact, dependent, by reason, for instance, of an interval between the determination of the prior estate and the taking effect of the use. Thus a limitation to the use of A for life, and after his death and one day to the use of B for life, though it would be inoperative as a remainder, may be good as a future use in B.[4] And where A covenanted to stand seised to the use of B after the death of A and his wife, it was held a good limitation of a future use, though no estate was limited to the wife of A if she survived him, and the use to B could not, therefore, have been sustained as a remainder,

[1] 2 Cruise, Dig. 264, 267; *ante*, p. *11; Wilson, Uses, 150; Gilbert, Uses, Sugd. ed. 159, n.; Hayes, Real Est. 167.

[2] Gilbert, Uses, Sugd. ed. 155, n.

[3] Wilson, Uses, 9.

[4] Wilson, Uses, 24; Colthirst *v.* Bejushin, Plowd. 25; Corbet *v.* Stone, T. Raym. 144.

for want of a particular estate to support it.[1] The case of Weale *v.* Lower, already cited, presents the distinction above stated. There the limitation was to the use of A for life, and, after the death of A and B, to C in fee, and was held a contingent remainder, because, if B were to die in the lifetime of A, C's estate would at once vest in him, and come into possession upon the natural determination of A's estate ; while on the other hand, if B survived A, the remainder over to C would be defeated.[2] Nor would there be any [*288] * difficulty in Doe *v.* Whittingham, just cited, from the want of a seisin to support the future use if the wife survived the husband, as in that case the use would result to the heirs of the covenantor during the life of the wife, and the seisin of the covenantor would serve the future use in B.[3]

9. It would be a manifest omission of an important principle connected with the doctrine of springing and shifting uses, if recurrence were not again had, in this connection, to the rules applicable to conditional limitations, the distinction between which and contingent remainders, in one class of cases, and conditions at common law, in another, is often exceedingly nice, and yet very important in its consequences. As an illustration, if an estate is limited to A *until* B return from Rome, and *after* B return to C, the limitation is a contingent remainder, and good as such. But if the estate had been limited to A, which would be for life if no words of inheritance were annexed, provided that if B return from Rome the estate should go to C, the limitation, though precisely the same in effect as the first, would be, not a remainder, but a conditional limitation. In the one case, if C's estate comes into effect at all, it is after the prior estate had determined by the natural expiration of the time for which it was limited ; whereas, in the other, C's estate, if it took effect, came in and displaced the prior estate before its natural termination, and took its place as a substitute therefor. Then, again, though the estate of A is a conditional one, liable to be

[1] Doe *v.* Whittingham, 4 Taunt. 20 ; Wilson, Uses, 25.
[2] Weale *v.* Lower, Pollexf. 65.
[3] Doe *v.* Whittingham, 4 Taunt. 22.

defeated by the happening of a contingent event, it is not a case of condition at the common law, where to determine an estate for a breach of it required an entry by the grantor or his heirs, who thereby regained the estate originally parted with; but it is a case where the estate is wholly parted with by the grantor, no interest being left in him, and passes at once, upon the happening of the event, to him to whom it is limited. That contingent event, when it happens, is the limitation of the first estate granted; and the estate, instead of going back to the original grantor, goes over, *eo instanti*, and without any act but * that of the law, to the party [*289] named in the very gift itself of the estate, as the one to take it in that event.[1] In case of a condition at common law, and the estate granted is defeated by the happening of the event, and the re-entry by the grantor, it is restored to or revests in the grantor as of his original estate. If it determines by its original limitation, or the natural expiration of the estate as first granted, it reverts at once, and without any act on his part, to the grantor. If it determines by being defeated by the contingent event before its natural expiration, it goes in the case above supposed to the second party, or grantee, in the nature of a remainder, technically constituting, as above stated, a conditional limitation. The following is given, in one case, as an instance of a conditional limitation. One holding an estate, the consideration for which had been paid by his daughter, conveyed it to another upon an agreement that he should support the daughter till she was married; and if she was married, and paid the expenses of her support, the estate was to go to her and her heirs. The daughter married and died, having paid the cost of her support. It was

[1] Gilbert, Uses, Sugd. ed. 177, n.; Fearne, Cont. Rem. 10, 383, Butler's notes; Cornish, Uses, 95; Cogan *v.* Cogan, Cro. Eliz. 360, where the conveyance failed, not being to uses; 2 Fearne, Cont. Rem., Smith's ed. § 149; Sand. Uses, 152–154; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, in which case this subject is fully examined, and with great ability and power of discrimination, by Bigelow, J. And for a further illustration of the distinction between a condition, a limitation, and a conditional limitation, as applied to estates at common law or by way of uses or executory devises, see 2 Smith's Fearne, §§ 34–39; Touch. 117, 150, 151; 1 Prest. Est. 45–49; 2 Wood's Conv., Powel's ed. 506; Henderson *v.* Hunter, 59 Penn. St. 340.

held that the estate was defeated in the first taker, and went to her heir without any act done on her or his part.[1]

10. These conditional limitations are indeed shifting or secondary uses, and can only be created by way of use, or by last will, where they take the name of *executory devises*. They would be void if inserted in a deed at common law, which does not derive its effect from the statute of uses.[2] An ingenious and astute writer in the American Jurist[3] undertakes among other things, in a treatise upon the "distinction between conditions and limitations in deeds and devises," to define the difference between "contingent" and "conditional" "limitations." "They are," he says, "sometimes used as synonymous and convertible terms, though properly applicable to estates essentially different." "There are limitations in devises, and limitations in deeds. Limitations in common-law conveyances may be contingent; limitations in devises, conditional." "Both species of limitations are, properly speaking, contingent. A condition annexed to an estate by devise loses its distinctive character, because the testator intended the estate peremptorily to go over on the happening or failure of the event, which, if found as a qualification annexed to a deed, would create a condition." The whole article is well worthy the reader's attention; but the distinction between these limitations is quite refined, and the context usually furnishes a sufficient explanation of the sense in which the terms are intended to be applied by writers who employ them.

11. Thus far, the estates spoken of under this head have been those of freehold. But the same rules, it will be found, which have been applied to future uses in respect to [*290] freeholds, * apply as well to uses in chattel interests.[4] In this respect such uses differ from corresponding estates at common law, by which there can properly be no

[1] Battey *v.* Hopkins, 6 R. I. 445.

[2] Gilbert, Uses, Sugd. ed. 178, n.; 2 Fearne, Cont. Rem., Smith's ed. § 149, n., § 150; Wilson, Uses, 47; Cornish, Uses, 96.

[3] 11 Am. Jur. 42, 44, *et seq.* See also Buckworth *v.* Thirkell, 3 B. & P. 655, note, where Lord Mansfield says: "It is contended that this is a conditional limitation. It is not so, but a contingent limitation."

[4] Wilson, Uses, 47.

remainder of a term for years. Though a lessee may part with his term, or a part of it, he cannot limit it by way of remainder, in the proper sense of that term. Thus, if one possessed of an estate in lands for fifty years were to grant the premises to one for twenty years, with the remainder of his estate to another, it would be nothing more than dividing his estate into two parts, the first of which he gives to A, and the balance, namely, for the thirty years of the fifty from and after the expiration of the twenty, to B.[1] But, as the law anciently stood, had he granted his term as an entire thing, though it were for an hour, he would have parted with his whole estate or interest, and there could be no subsequent limitation of a term for years after an estate was carved out of it. But this was soon altered. And yet, because a freehold estate is, in the theory of the law, always deemed of superior capacity and importance to a term for years, however extended, there cannot at this day, by the common law, be a limitation of the balance of a term after the limitation of the term itself for the life of the grantee.[2] This can only be done by the way of a springing or shifting use, or executory devise.[3]

12. The future use of a chattel interest which may be limited cannot be limited by way of a remainder, whether preceded by a prior limitation, or limited on a certain or uncertain event. It is either a springing or shifting use, or an executory bequest, falling within the rules which govern such uses or bequests, or it is a conditional limitation.[4] But if the term be limited, first to one and the heirs of his body, the whole term will vest in him, since there cannot be an estate-tail in chattels within the * statute *de donis;* [*291] and what would be an estate-tail in inheritable lands becomes an absolute ownership of the chattels if limited to

[1] 1 Cruise, Dig. 235; 2 Fearne, Cont. Rem., Smith's ed. § 159.

[2] 1 Cruise, Dig. 235; 2 Prest. Abst. 5; 4 Kent, Com. 270; Fearne, Cont. Rem. 401, Butler's note; *ante*, vol. 1, p. *368; Wright *v.* Cartwright, 1 Burr. 284; Burt. Real Prop. § 897; 2 Bl. Com. 174.

[3] 2 Bl. Com. 174; 2 Fearne, Cont. Rem., Smith's ed. § 159 a; 2 Flint, Real Prop. 301; Wright *v.* Cartwright, 1 Burr. 284; Wilson, Uses, 30.

[4] Fearne, Cont. Rem. 401, Butler's note; 2 Fearne, Cont. Rem., Smith's ed., § 159 a; Burt. Real Prop. §§ 946, 947.

the heirs of the body of the donee or grantee.[1] The following cases will illustrate a limitation of successive estates in a chattel interest. One having a term devised the house and land to A B for life, with remainder after his death to his sister; and this was held to be a good executory bequest to the sister to take effect after the death of A B.[2] W. W., possessed of a term in lands, assigned it to trustees in trust that he should first receive the profits during his own life, after his death his wife to have the profits during her life, after her death J. O. to receive half the profits during his life, and after his death his child during his life; after the death of such child, E. O. to have the profits during his life, and after his death his child, and after decease of the child of E. O. to permit S. Chalfont to receive the profits. It was held, that, all the trusts being expressly limited for life or lives, the same were good, and the remainder limited to S. Chalfont was a good one.[3] There are many rules in regard to the questions what limitations are executory, what is the effect of a limitation after a preceding executory one, within what time a use must arise to constitute a valid limitation, and what limitations would be too remote, which are either directly derived from the law of executory devises, or are so nearly identical therewith that it would be little more than repetition to explain and illustrate them here, and again when treating of executory devises. It is proposed, therefore, to defer the consideration of these questions until the subject is resumed as a part of the law of executory devises, since "a springing use is in a deed what an executory devise is in a will, and the same rules are applicable to both."[4]

13. In considering the qualities and incidents of future uses if once created, they are, in the first place, devisable and assignable in equity, and will descend to heirs where [*292] the person who * is to take can be ascertained; but they cannot be conveyed by deed.[5]

[1] Burt. Real Prop. § 948; *ante*, vol. 1, p. *74; 2 Flint, Real Prop. 303; Gibbs *v.* Barnardiston, Prec. in Chanc. 323; Seal *v.* Seal, Id. 421.

[2] Lampet's case, 10 Rep. 46; Burt. Real Prop. § 946.

[3] Oakes *v.* Chalfont, Pollexf. 38. [4] Gilbert, Uses, Sugd. ed. 174, n.

[5] Wilson, Uses, 156, 169; Jones *v.* Roe, 3 T. R. 88; Hobson *v.* Trevor, 201; Wms. 191; Cornish, Uses, 100, 101; Fearne, Cont. Rem. 366, and Butler's note; 2 Wms. Saund. 388 k.

14. In analogy to the rules of the common law, by which one having a reversionary interest may have waste against a tenant who does acts to impair the inheritance, if the one who is in possession commit wilful waste upon the estate, chancery will interpose to prevent it upon the application of one entitled to a future use in the estate.[1]

15. In one important respect, the law as to future executory uses, answering to springing and shifting uses, varies from that relating to contingent remainders by the way of uses, as it stood until the late statutory regulations upon the subject; and that is, as to the former being affected by the changes in or destruction of the estates which precede them. It is only necessary to repeat, that, in case of a contingent remainder, it is in the power of the legal tenant for life to defeat the remainder by destroying that upon which it depends; but nothing which the owner of a prior limited estate, in the case of a springing or shifting use, can do, can bar or affect the latter,[2] since the second estate does not depend upon the first.

16. It should be stated, however, for the purpose of being applied hereafter, that a series of cases hold that there is this difference between a contingent freehold remainder at common law and one limited by way of use, that if, in case of the former, when the remainder vests, there is a right of entry remaining in him to whom the prior particular estate was limited, it will sustain such remainder, although such person may have lost his seisin; whereas, in the case of a contingent use limited as a remainder, there must be an actual seisin in him who has the previous estate on which such use depends, subsisting at or after the time when it comes *in esse*, out of which such use * may arise, before it can be executed [*293] by the statute, a seisin ready to unite with the use being essential to the estates taking effect. But it does not seem to be material, upon this theory, whether this seisin should be

[1] Fearne, Cont. Rem. 562, and Butler's note; Stansfield *v.* Habergham, 10 Ves. 275.

[2] Cornish, Uses, 98, 99; Gilbert, Uses, Sugd. ed. 287, 290, and note; Wilson, Uses, 48; Tud. Lead. Cas. 263; Archer's case, 1 Rep. 67; Chudleigh's case, Id 120; 4 Kent, Com. 241; 2 Cruise, Dig. 281.

in the feoffees to use, or in some *cestui que use* in whom a preceding use had vested.[1] In the case, therefore, of the remainder at common law, if the tenant of the preceding estate had been disseised, the contingent remainder dependent upon it would not be defeated so long as the disseisee had a right of entry remaining.[2] But in the case of a remainder by way of use, if the tenant is so disseised, there must be an actual entry made and a seisin regained before the contingent use can be executed by the statute; though this may be either by the feoffees, or the *cestui que use* under some preceding vested use, for the obvious reason, that, in carrying out this idea, there must be an actually existing seisin in some one who is privy to the use, which seisin is capable of being united with the use.[3] But it should also be stated, that, where a right of entry subsists in the feoffee or *cestui que use* of some preceding vested use, the necessity of an actual entry by him in order to regain a sufficient seisin to serve a contingent use is directly controverted by Mr. Sugden, in which he is sustained by Chancellor Kent, as well as by the reasoning of Mr. Fearne and Mr. Butler, Mr. Cruise, and of Prof. Greenleaf. Their doctrine, when analyzed, is, that limitations to uses of remainders should be construed in like manner as limitations of remainders at common law. It discards the idea of a *scintilla juris* in the feoffees, and holds that the statute draws the estate in the land out of the feoffees, and they become divested, and the estates limited prior to the contingent uses take effect as legal estates; and the contingent uses take effect as they arise by force of the original seisin of the feoffees, the vested estates being subject to open and let in the contingent uses.[4] This theory, it will be seen, discarding all notion of a *scintilla juris* in the original feoffees, assumes that the statute, through the seisin originally

[1] Fearne, Cont. Rem. 290, Butler's note.

[2] *Ante*, p. *260; Fearne, Cont. Rem. 286; 4 Kent, Com. 287; Cornish, Uses, 134.

[3] Fearne, Cont. Rem. 290, 295, and Butler's note; Chudleigh's case, 1 Rep. 120; 4 Kent, Com. 242; Wegg *v.* Villers, 2 Rolle, Abr. 796.

[4] Sugd. Pow. c. 1, § 3, pp. 17–48; 4 Kent, Com. 238–246; Gilbert, Uses, Sugd. ed. 297, n.; Fearne, Cont. Rem. 293, 295, and Butler's note; 2 Greenl. Cruise, Dig. 282, 284, n.; Tud. Lead. Cas. 260.

in these feoffees, virtually converts the successive uses into so many * legal estates as they rise, giving them the incidents and properties of legal estates in remainder, whether vested or contingent, according as the terms of the limitation may be.[1] [*294]

17. As a mere matter of practical utility, it can be of very little importance to settle this point of nice technical law. It first arose in the time of Ch. J. Dyer; but as a part of what has been deemed to be the English law of real property, it could not be properly omitted altogether. And a single case which arose under it may serve to illustrate the application of the doctrine, while it presents a curious incident in personal history which cannot be without interest to the reader from the names and character of the parties concerned. The case referred to is that of Wegg *v.* Villers. The circumstances under which it arose were these, as stated by the biographer of Lord Coke. The relations of Lord Coke with his wife, Lady Hatton, it is well known, were not of the most pleasant kind. Coke having fallen into disgrace with King James, while acting as Lord Chief Justice, sought to regain the favor of that weak and capricious monarch; and it was through the agency of Buckingham, who was at the time the king's favorite, that he sought to operate upon the king. Buckingham had a brother, Sir John Villers, and Coke a daughter Frances, by Lady Hatton, and he proposed a match between them. The mother, angry at not having been consulted in the matter, carried her daughter off, and secreted her. Coke, discovering her place of concealment, went with his sons and seized her by force. Lady Hatton appealed to the Privy Council, and it became an affair of state. It was at length adjusted upon Lord Coke's paying £10,000 sterling, and entering into articles of settlement upon the marriage of his daughter, pursuant to articles and directions of the Lords of the Council. The adroitness with which this settlement was drawn,

[1] 1 Prest. Est. 155, 158, 170; Hayes, Real Est. 167. Mr. Cornish rather defends the notion of a *scintilla* in the feoffees to supply the necessary seisin to the contingent uses as they arise; though he says it is "a doctrine which has been much agitated, and is not, to this day, acquiesced in or understood." Cornish, Uses, 140. See also Sand. Uses, 111; Booth's Opin. Shep. Touch. 531, note.

and the cunning manner in which he arranged its
[*295] provisions, so as to defeat it or let it stand good as * he might choose, will be perceived by recurring to its terms, and remembering and applying the idea advanced in Chudleigh's case, that the uses, so far as contingent, must have an actual seisin in some one, answering to a feoffee's, to sustain them. In the first place, the conveyance was made by covenant to stand seised on his part, and the limitations derived their force and effect from the seisin in himself; for he covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to her first and other sons in tail, reversion to his own right heirs. This gave an estate to him for life in possession, a vested estate for life in remainder to his wife, and the same to his daughter for life in remainder, with contingent uses by way of remainder to unborn sons in tail, reserving to himself, after and above all these limitations, a reversion in fee. Lord Coke then made a deed of *grant* of this reversion to a third person without consideration, and in his deed recited the foregoing settlement. He then made a *feofment* in fee of the lands thus settled, with livery of seisin. As all the estates but the reversion were by way of use, it was the seisin that was in him as covenantor and reversioner which was to support them; and if this was destroyed, so far as these were contingent, they would be defeated. But as his grant of this reversion was to one having notice, it remained subject to the settlement; and the seisin of this grantee was that out of which these uses were to arise in the same way, as from the seisin which Lord Coke had had before the grant. But as he was also in possession for life, the effect of his feofment was not only to destroy his own seisin and estate, but to make a discontinuance of that of his grantee, the reversioner, together with the estate of the wife and daughter. But it left a right of entry in the daughter. But as this discontinuance was a forfeiture of the father's life-estate, and that of his wife during coverture, it gave a right of entry in the daughter as holder of the next vested estate, and a contingent right of entry to the wife, dependent on her surviving her husband. The former was sufficient to support

the contingent use to the daughter's first son, provided there should be a seisin to serve such use when it should arise. As it turned * out, Lord Coke's wife survived [*296] him, and having, by the right of entry which she thereby acquired, entered upon the estate, reinstated the divested estates, including that of the grantee of the reversion, out of whose seisin the contingent uses were to arise, and the limitations all took effect in their order. If, however, Lord Coke had made his feofment before making the grant of the reversion, the effect would have been to have worked a disseisin, and divested all the then subsisting estates, including the estate or seisin out of which the contingent uses were to arise, and which was to serve them. For as there was no privity between his feoffee, his wife or daughter and his heirs, whose seisin alone could support their contingent uses, no entry by the wife or daughter could restore the estate and seisin of Lord Coke or his heirs, contrary to his own feofment, since he himself could not have entered against such a feofment. Now, the cunning part of the arrangement, which was defeated by his dying while things were in the above state, was this: If he had seen fit to sustain the remainders, he would have suppressed the feofment, and only have shown the grant of the reversion, to counteract the feofment, if that should be set up by any one; whereas, if he had wished at any time to destroy the remainders, he would have suppressed the grant of the reversion, and left the feofment to have its effect. As he left both these in force, it gave rise to the action above named, and an indefinite amount of refinement and ingenious discrimination upon a rule of law too subtle to be apprehended by ordinary minds.[1]

18. There is what may be deemed to be an exception to the general rule, that no act of the holder of prior estate can operate to bar a springing or shifting use when it shall arise; and that is, if the prior estate be an estate-tail. In that case, the tenant in tail, by suffering a recovery, may defeat the use

[1] Biog. Dict. Lond. 1798, "Coke;" Wegg *v.* Villers, 2 Rolle, Abr. 796; Fearne, Cont. Rem. 295–298; Sugd. Pow. 32; Gilbert, Uses, 194–197; Gilbert, Uses, Sugd. ed. 395, n. See, as to the general doctrine of the above case, Lloyd *v.* Brooking, Ventr. 188

which awaited the contingent event which was to have determined such estate. Thus where the limitation is to [*297] A and his heirs, * to the use of B in tail, provided that if C return from Rome, then to D in fee. Now, D's interest is a shifting use; and yet, if B were to suffer a recovery, he would bar the limitation over, if done before C's return from Rome.[1]

19. For this reason, shifting uses limited after estates-tail are not within the rule of law against perpetuities, as it is called, which was made to prevent the locking up of estates for an undue period of time, because the tenant in tail, under such circumstances, has full power of defeating such use, and of converting it into an alienable estate, instead of its being held as not susceptible of alienation.[2]

20. So if a future limitation by the way of use can take effect as a remainder, no remoteness of time or event, however great, can affect the validity of such a limitation.[3]

21. The time within which a springing or shifting use must be limited to take effect, in order to be valid within the rule against perpetuity, is by the English law, and that of such of the States as have not adopted special rules upon the subject, a period within a life or lives in being and twenty-one years and a fraction afterwards. If the time at which it is to take effect may exceed that period, it will be a void limitation.[4] But it is enough that the freehold is to vest within that time, though it may not come to be enjoyed till long afterwards. Thus a limitation to A for two hundred years, with remainder to the use of the unborn son of B in fee, would be good as a springing use: first, because, being limited after a term for years, it could not take effect as a contingent remainder; second, because the event on which the remainder must vest, if ever, must happen within the pre-

[1] Tud. Lead. Cas. 263; Wilson, Uses, 64; Sand. Uses, 153; Fearne, Cont. Rem. 17; Gilbert, Uses, Sugd. ed. 157, n.

[2] Gilbert, Uses, Sugd. ed. 157, n.; Wilson, Uses, 74; Goodwin *v.* Clark, 1 Lev. 35.

[3] Cole *v.* Sewell, 4 Dru. & Warr. 28; *ante*, p. *235.

[4] Co. Lit. 271 b, n. 231, § 3; Cadell *v.* Palmer, 1 C. & Fin. 372; Lewis, Perpet. 160; Wilson, Uses, 148, 721; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 153.

scribed term, as it must be within the fraction of a year after a life in being.[1]

22. By the laws of New York, the power of alienation shall not be suspended by limitation or condition for a longer period than during two lives in being at the time of the creation of the estate, except that one remainder may be created on another, to take effect in case the prior one fails, by being given to one, but if he die before he is twenty-one, then to a second, or by any other means the estate of the first is to determine before he attains full age.[2] And this proposition under this law was recently sustained, that if the person named to take during a trust term, which is a lawful limitation in its duration, dies during that term, the use in his favor may be shifted to some other person, and be good, although not in existence when the trust was created.[3]

[1] Wilson, Uses, 68, 71; Gore *v.* Gore, 2 P. Wms. 28. There are statute provisions in several of the States prescribing the time within which future estates must vest and become the subjects of alienation, which will be found mentioned at the close of the chapter on Executory Devises.

[2] Lalor, 68, 86.

[3] Harrison *v.* Harrison, 36 N. Y. 543. See Gilman *v.* Reddington, 24 N. Y. 9.

CHAPTER VI.

POWERS.

SECT. 1. Of their Nature and Classification.
SECT. 2. Of suspending or destroying Powers.
SECT. 3. Powers applied both in American and English Law.
SECT. 4. How Powers may be created.
SECT. 5. By whom and how a Power may be executed.
SECT. 6. Of Excessive or Defective Execution of Powers.
SECT. 7. Rules of Perpetuity affecting Powers.
SECT. 8. How far Equity aids the Execution of Powers.

[*300] ## *SECTION I.

OF THEIR NATURE AND CLASSIFICATION.

1. Powers defined.
2. Powers derived from the statute of uses.
3. Their analogy to springing and shifting uses.
4. How derived from the statute of uses.
5. Powers illustrated, and their terms defined.
6. Powers, how executed through the statute of uses.
7. Power and estate may be in the same person.
8. A use created upon a use by a power is a trust.
9. Classification of powers. — Powers appendant.
10. Powers in gross.
11, 12. Powers appendant and in gross illustrated.
13. Powers, how affected by conveyance of the land.
14. Powers general, and special or particular.
15. How far every power is one of appointment and revocation.

1. BEFORE proceeding to consider the law of executory devises, and with it what remains to be distinctively said of springing and shifting uses, it seems proper to treat of another mode of changing and affecting the limitation of estates, which is derived from the statute of uses, and is intimately connected with this last-mentioned class of uses; and that is by what are

in law called Powers, "which are methods of causing a use with its accompanying estate to spring up at the will of a given person."[1]

2. Powers, as thus applied, do not come within the popular meaning of the term when used in reference to acts done by one as the agent or attorney for another.[2] They derive their origin and character directly from the doctrine of uses. It will be recollected, that, prior to the statute 27 Henry VIII., any *one, upon parting with his legal [*301] seisin and estate to the feoffee to whom he saw fit to transfer it for the purpose of raising a use out of the same, if he did not then desire to make a full and final disposal of the use, might reserve to himself the right of declaring, at a future time, to whose use the lands should be held, or to whom the feoffee should convey them; which right he might exercise, though by so doing he might defeat a present use which he had declared at the time of making the feofment; or he might, when making such feofment, provide for such a future disposition of the use by some third person, and that the feoffee or trustee should convey the lands as such third person should appoint. At common law, however, no one could reserve to a stranger a power of entering upon land and defeating the title of one in possession thereof for a condition broken.[3]

3. This is the principle from which are derived springing and shifting uses, by which, as previously explained, one conveying land might provide by the same instrument, that, upon the happening of some future event, a use should spring up, or one thereby declared should shift from one person to another, without requiring any other act to be done in the way of transfer, the appointment by the one having the power being in effect tantamount to the happening of the event which was to cause the future use to spring up or shift.[4]

4. In giving effect to these, chancery further seized upon that expression in the statute of uses by which the estate of

[1] Wms. Real Prop. 245.

[2] Hunt *v.* Rousmaniere, 8 Wheat. 174; Combe's case, 9 Rep. 76.

[3] Sugd. Pow. 4; Cornish, Uses, 19; Co. Lit. 237 a.

[4] 1 Spence, Eq. Jur. 455; Bac. Law Tracts, 314; Cornish, Uses, 19; Co. Lit. 271 b, note 231.

the feoffee to use was declared to be in the *cestui que use*, "after such quality, manner, form, and condition" as he had before in or to the use that was in him, and retained its cognizance of uses to be raised or declared by the means above mentioned, and thus introduced a capacity of working changes in the ownership of estates in lands which was unknown to the common law.[1] It was in this way that the whole [*302] system of * modern powers had its origin, and from this source they derive their properties and qualities.[2]

5. The definition of a power given above may probably be insufficient to convey any definite idea of what is properly embraced under the term. Nor can this be easily done without referring to instances and examples rather than attempting to set forth any abstract proposition upon the subject. Chancellor Kent defines a power as "a mere right to limit a use."[3] Mr. Cornish calls powers "merely modes or media of raising a future use."[4] Mr. Booth, and his language is adopted by Mr. Hilliard and Mr. Butler, says: "Where a use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth, both are future and contingent uses until the act is done, and afterwards they are, by operation of the statute, actual estates. But till done, they are in suspense, the one depending on the will of Heaven whether the event shall happen or not, the other on the will of man. *While these last are in suspense, they are called Powers.*" And Mr. Butler illustrates this statement by supposing an estate conveyed to A and his heirs to the use of B for life, remainder to such uses generally, or to such son of B as B shall appoint, and B appoints to the use of his first son. Immediately upon the appointment, the use is executed in the son. B had only a life-estate, and consequently could not convey an estate-tail to his own son. "It

[1] 3 Report, Eng. Com. Real Prop. 27, 28.

[2] Wms. Real Prop. 245. Mr. Chance insists that something answering to powers existed at common law. Chance, Pow. §§ 5–12. But as powers here understood are derived from the statute of uses, it is unnecessary to stop to examine the point.

[3] 4 Kent, Com. 334.

[4] Cornish, Uses, 89.

operates, therefore, as a designation of the person to take the use. The right to make this designation is termed a *Power of Appointment.* The exercise of it is termed an *Appointment.* The person taking under it is termed the *Appointee.*"[1] Another illustration of the operation of a power, *varying somewhat from the case above supposed, [*303] would be this: A conveyance is made to A and his heirs to such uses as B shall by deed or last will appoint; and, in default of or until such appointment made, to the use of C and his heirs. A in this case is simply a feoffee to uses; and, until some appointment made by B, the seisin in A unites with the present use in C, and vests the estate in C by virtue of the statute. But if B were at any time to direct that the use should thereafter be in D, or, in other words, to appoint the use to D, although B had no property or estate whatever in the land, the moment he makes such declaration or appointment by deed or will, the estate which is in C is at once divested, and becomes vested in D.[2]

6. It is not that B conveys any estate in or acts directly upon the possession of the land. His is a mere power, which operates, when exercised in the form prescribed, as a limitation of a use in favor of the one he may name; and then the statute at once unites the seisin with the use in D, executing it, and thereby perfecting his estate.[3] By these illustrations, the applicability of the language of Mr. Booth above cited will become apparent. The act of declaring the use in the case supposed becomes the event upon the happening of which a new use springs up in favor of D, or the old one in C shifts from C to D, giving these transactions the operation and effect of an ordinary springing or shifting use.[4]

7. Now, it would have been equally competent to have had the limitation made in the case supposed to such uses as B should by deed appoint, and, in default of or until such appointment, to the use of B himself and his heirs, instead of C.

[1] Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4; Shep. Touch. Hill. ed. 529, note.

[2] Tud. Lead. Cas. 264; Wms. Real Prop. 245.

[3] Co. Lit. 271 b, Butler's note, 231; 2 Flint, Real Prop. 545; Rush *v.* Lewis, 21 Penn. St. 72.

[4] Tud. Lead. Cas. 264; Watk. Conv. 264, Coventry's note.

And in that event B might either appoint the estate to a third person in the execution of his power, or might convey it by deed to such third person, by virtue of the estate in himself.[1] And yet, * if he acts under his power, and appoints a use in favor of such third person, it will take effect as the execution of a power, defeating his own estate in himself, and the appointee will, in such case, take, not under him or by a title derived from him, but simply under and by virtue of the use thus declared in his favor to which the statute executes the seisin, and thereby creates his estate.[2] This result grows out of a rule of universal application, that, when one takes an estate by the execution of a power, it is, to all intents, as if he took by the deed which created the power, and his conveyance had been inserted in that, instead of coming to him mediately through the one holding the power. And the test of the validity of the estates raised by appointment is to place them in the deed creating the power in lieu of the power itself; meaning to waive for the present all questions as to the time to which such conveyance by means of a power relates, whether to the creation or execution of the power.[3] On the other hand, if, in the case supposed, the one having such power and estate in himself were to convey his estate without reference to his power, the power would thereby be extinguished, and could not be executed in derogation of his own conveyance; or if a part only of his interest were conveyed, his power would be suspended as to such interest, leaving him full authority to execute it, provided he do nothing to impair his own conveyance.[4]

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8. If, in the case supposed, B, instead of appointing the use to D, when the statute executes the seisin in D, and so creates a legal estate in him, had appointed the use to D and

[1] Wms. Real Prop. 251, and note; Logan *v.* Bell, 1 C. B. 884.

[2] Watk. Conv. 268, Coventry's note; Roach *v.* Wadham, 6 East, 289; Wms. Real Prop. 251.

[3] Bringloe *v.* Goodson, 4 Bing. N. C. 726; Doe *v.* Britain, 2 B. & Ald. 93; Mosley *v.* Mosley, 5 Ves. 256; 2 Flint, Real Prop. 545; Sugd. Pow. 260; Watk. Conv. 264, Coventry's note; 4 Kent, Com. 337; Co. Lit. 113 a; Bradish *v.* Gibbs, 3 Johns. Ch. 550; Doolittle *v.* Lewis, 7 Johns. Ch. 45.

[4] Wms. Real Prop. 251; Hay *v.* Mayer, 8 Watts, 203; Den *v.* Roake, 5 B. & C. 720; Burt. Real Prop. § 179; 4 Cruise, Dig. 227; Goodright *v.* Cator, Doug. 477.

his heirs, to the use of E and his heirs, inasmuch as there cannot be a use executed upon a use, the effect would have been to leave * the legal estate still in D, who [*305] would hold the same in trust for E, by force of the rules and of equity in such a case.[1]

9. From the circumstance that a power may be given to one who has an interest in the lands in respect to which the power is to be executed, or may be given to one who is a stranger to the estate, and that the result is the same when the power is executed upon the estate which is subject to it, arises a classification of powers into two kinds; namely, such as are collateral, and such as are not. If the one who has the power, commonly called the donee of the power, has no estate in the land, the power is said to be a collateral or naked power.[2] There is besides a subdivision of the class of powers, which are held by a donee who has some estate in the land, into powers appendant and powers in gross. Powers appendant are such as the donee is authorized to execute out of the estate limited to him, and depend for their validity upon the estate which is in him. He is thereby able to create an estate which will attach on an interest actually vested in him. The illustration given by Mr. Sugden is of a life-estate limited to a man with a power to grant leases in possession, which must in every case have its operation out of his estate during his life.[3]

10. Powers in gross are such as one who has an estate in land has, to create such estates only as will not attach on the interest limited to him, or take effect out of his own interest. The illustration of Hale, Ch. B., of such a power, is where a tenant for life has a power to create an estate which is not to begin until his own ends. It is a power in gross, because the estate for life has no concern in it.[4] Another illustration

[1] Wms. Real Prop. 246–267; Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4; 4 Cruise, Dig. 220.

[2] Sugd. Pow. ed. 1856, 107; Edwards *v.* Slater, Hardr. 415, per Hale, C. B.; Tud. Lead. Cas. 286; Bergen *v.* Bennett, 1 Caines, Cas. 15.

[3] Sugd. Pow. ed. 1856, 107; Edwards *v.* Slater, Hardr. 416; Bergen *v.* Bennett, 1 Caines, Cas. 15, per Kent, J.; Burt. Real Prop. § 179.

[4] Sugd. Pow. 114; Edwards *v.* Slater, Hardr. 416; Burt. Real Prop. § 180; Wilson *v.* Troup, 2 Cow. 236; Tud. Lead. Cas. 293; Watk. Conv. 260.

would be this: By a marriage settlement, the husband, prior to the marriage, conveyed the estate to trustees for his use during life; and if his wife survived him, to her use during life, and then to such children of theirs and their heirs as he by his will should direct, when the trust was to cease. The marriage took place, and they had children. It was held, that, beyond his life-estate, the husband had no estate in the land, but a mere naked power of appointment; and unless he executed that, the estate would pass to the issue and their heirs in equal shares, upon the ground that where a trust is created in a marriage settlement, if there is no special agreement to the contrary, it is intended to make provision for the issue of such marriage.[1]

11. This doctrine of powers appendant may be further illustrated and explained in the matter above mentioned [*306] of creating * leases. It is hardly necessary to say, that at common law a tenant for life could not create a lease which should extend beyond the term of his own estate. But it is common, in making settlements of estates, to authorize the one who is to have the estate for his life to make leases thereof for a certain number of years, generally twenty-one, by way of use. Now, this is a power appendant. The lease takes its effect out of the estate of the tenant for life, the donee of the power. And if before he executes it he parts with his entire estate, the power is extinguished. When executed, the lease takes effect from the power; and the lessee will have the same right to hold for his whole term, if the tenant for life die before his term expires, as if he had derived his title to his term directly from the original party who created the life-estate and the power.[2] And even if the lease be for a longer time than authorized by the power, it seems it would be good up to the limits of that period for which it might have been made.[3]

12. Further illustrations of what would be accounted pow-

[1] Gorin *v.* Gordon, 38 Miss. 214.

[2] Wms. Real Prop. 254, and Rawle's note; 4 Cruise, Dig. 157; Sugd. Pow. ed. 1808, c. 10, § 1; *ante*, vol. 1, p. *308; Maundrell *v.* Maundrell, 10 Ves. 246; Tud. Lead. Cas. 286, 289; Wilson *v.* Troup, 2 Cow. 236; Ren *v.* Bulkeley, Doug. 292; Burt. Real Prop. § 177.

[3] Campbell *v.* Leach, Ambl. 740; Tud. Lead. Cas. 317.

ers in gross, and of their nature, would be found in cases like the following; namely, where a tenant for life had a power to appoint the estate to his children after his decease, or had a power to jointure his wife out of the estate after his death. So, too, where the owner of a fee reserves to himself a power over the uses of the land, at the same time that he conveys away all his estate in it, it being sufficient, as it seems, to give a power this character, that the one exercising it either has an interest in the land out of which the use arises, or in the use raised by such power, provided the estate created by the power in no way interferes with or takes from such interest.[1]

13. It may be remarked in this connection, to be resumed more at length, that, if the one having the power has also an interest in the land which is not to be affected by the exercise * of such power, this will not be destroyed [*307] by any conveyance of the land, except by a feofment. But the power over a use which a party reserves upon his grant of an estate he may extinguish by a release. And the same, it seems, is true of a power given to a stranger to be exercised for his own benefit;[2] whereas, if the power be simply a collateral one, "which means that it is extrinsic and totally unconnected with any interest in the land," the donee of such a power cannot, by any act whatever, extinguish or release it.[3]

14. Another classification of powers is into general, and special or particular. If the donee is at liberty to appoint to whom he pleases, it is a general power. If he is restricted to an appointment to or among particular objects only, it is of the latter, or special class.[4]

15. If the power be to create a new estate in any one, it is said to be a power of *appointment;* if to divest or abridge an existing estate, it is called a power of *revocation.* But, as remarked by Mr. Sanders, every power of the kind under

[1] Burt. Real Prop. §§ 180–182; Tud. Lead. Cas. 294.

[2] Burt. Real Prop. §§ 180–182; Edwards *v.* Slater, Hardr. 416; Tud. Lead. Cas. 294; Wms. Real Prop. 256.

[3] Burt. Real Prop. § 183. Mr. Chance does not seem to approve of this attempt to classify powers into "collateral" and "in gross," and insists that the terms are convertible. Chance, Pow. § 34.

[4] Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4; Wms. Real Prop. 255.

consideration is a power of revocation and new appointment; for the new uses and estates created under the appointment must necessarily (to the extent of such appointment) revoke, defeat, or abridge the uses which existed and were executed previously to the new limitation; and though sometimes an express power of revocation is limited, prior to the power of appointing new uses, it is never necessary.[1] In Bird *v.* Christopher, the only power given in the deed was that of revocation.[2] But Mr. Burton says, that in such cases, "if this be done upon the original conveyance, a power of appointment is implied; but if a mere power of a revocation be [*308] inserted in an instrument of * appointment, the exercise of it can only restore the uses of the original settlement."[3] The mode in which this operates is this: The exercise of the power of revocation and appointment extinguishes the use in the former holder of the estate, and raises a new one in the appointee, to which the statute executes or annexes the seisin and possession, and thus creates a new estate in the appointee.[4]

SECTION II.

OF SUSPENDING OR DESTROYING POWERS.

1, 2. When a donee may release a power, and when not.
3. Of tenant for life with power over the reversion, conveying the estate.
4. Powers appendant may be released.
5. In what cases powers are suspended.
6, 7. Of the partial suspension of a power.
8. Power not suspended, though estate appointed be a future one.
9. An unexecuted power of revocation does not affect the existing estate.
10. Future limitation never a springing use if it can be a remainder.

1. After the foregoing explanations, it seems necessary, though at the hazard of repetition, to say something more of

[1] Sand. Uses, 154; Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4; Tud. Lead. Cas. 264; 4 Kent, Com. 415.

[2] Bird *v.* Christopher, Styles, 389.

[3] Burt. Real Prop. § 185; 4 Cruise, Dig. 220; Wright *v.* Tallmadge, 15 N. Y. 307.

[4] 4 Cruise, Dig. 219.

the capacity of a donee of a power to suspend, extinguish, or merge it, which may sometimes be done by a release of the power, and sometimes by an alienation of the donee's estate. In the first place, a mere collateral power cannot be destroyed or suspended by an act of the donee.[1] And the same is true of extinguishing powers in gross by a conveyance of the donee's estate, unless they were reserved by the grantor, or were to be executed in favor of the donee himself.[2] But powers, whether appendant or in gross, may, as a general proposition, be released by the donee or owner of the power to one having the freehold in possession, reversion, or remainder, which operates to extinguish them; for, not being a trust, the execution is generally optional with the donee, and it is not competent for him to derogate * from his [*309] own grant by doing an act to deprive the person to whom he has made such release of the estate acquired thereby.[3]

2. But in one case, where a father having a fund for life, with remainder to his children in such shares as he should appoint, and, in default of appointment, to the children equally, made a release of the power for the purpose of vesting in himself the share of a child that had deceased, and whose executor he was, the court refused to give present effect to the release so far as it operated to vest such share in him, although the power was, in fact, extinguished by the release.[4] And, as a general proposition, if the duty of the donee requires him to exercise a power at any future time, he cannot extinguish it by a release.[5]

3. In accordance with the foregoing doctrine, that a power

[1] Digges' case, F. Moore, 605; Tippet *v.* Eyres, 5 Mod. 457, s. c. 2 Ventr. 110. That the mere refusal of one having such authority, as an executor without interest to sell, to execute, does not disable him from executing it. See Tainter *v.* Clark, 13 Met. 220; Tud. Lead. Cas. 286, 295; West *v.* Berney, 1 Russ. & M. 431; Chance, Pow. § 3105.

[2] Tud. Lead. Cas. 294; Edwards *v.* Slater, Hardr. 416; Burt. Real Prop. § 180; Savile *v.* Blacket, 1 P. Wms. 777.

[3] Tud. Lead. Cas. 295; Burt. Real Prop. §§ 181, 182; Wms. Real Prop. 256; Albany's case, 1 Rep. 102 b; West *v.* Berney, 1 Russ. & M. 431; Chance, Pow. §§ 3115, 3137.

[4] Cunynghame *v.* Thurlow, 1 Russ. & M. 436, n.

[5] Wms. Real Prop. 256; Chance, Pow. § 3121.

in gross cannot be released, it has been held that a tenant for life, with a power of appointment as to the reversion, or of revocation as to a remainder, may execute his power, though he may have aliened his own life-estate.[1] And where an estate was settled to the use of H for life, remainder to the children of H, with a power in trustees to sell the estate during the life of H, at his request, H having conveyed his estate, requested the trustees to convey to his grantee, who did so; and it was held to be a good execution of the power, as H, by his deed, did nothing in derogation of the estate of such grantee to be derived from the trustees.[2]

4. But where the power comes within the class of appendant powers, as above defined, it is competent for the donee to suspend or extinguish it constructively by his own act, or he may extinguish it by a separate formal release. Thus, if the tenant for life, having a power to lease, conveys his entire estate, his power is extinguished.[3] So if lands are settled on one with a power of appointment to uses, and upon him in fee if he fail to appoint, he may alien the estate as his own, and will thereby defeat and extinguish his power. Nor does it make any difference in the result, whether the alienation is by the act of the donee of the power, or of the law. Accordingly, where a tenant under a limitation like that [*310] above stated became *bankrupt, it was held that the transfer in bankruptcy divested him of his entire estate, and the power of appointing the remainder was extinguished.[4]

5. So a power may be suspended if it be a power appendant; as where a tenant for life, with a power of appointment and revocation, instead of conveying his whole estate, demised the land for ninety-nine years, if he should live so long, to secure an annuity, it was held that he could not, by afterwards executing the power, defeat this demise, it having

[1] Tud. Lead. Cas. 294; Burt. Real Prop. § 176; Chance, Pow. § 3172.

[2] Alexander *v.* Mills, L. R. 6 Ch. 124.

[3] Ren *v.* Bulkeley, Doug. 291, 292; Penne *v.* Peacock, Cas. temp. Talb. 43; Chance, Pow. §§ 3157, 3159; Tud. Lead. Cas. 260; Burt. Real Prop. § 175.

[4] Burt. Real Prop. § 177; Wms. Real Prop. 251; Tud. Lead. Cas. 290; Doe *v.* Britain, 2 B. & Ald. 93; Chance, Pow. § 3155; Maundrell *v.* Maundrell, 10 Ves. 246.

been made for a good consideration. The power was thereby suspended.[1]

6. So a power of revocation and appointment may be partially suspended as to its taking effect, as where one, having an interest in land with a power of appointment, leased the land. Although he could not, by afterwards executing his power, defeat his lease, the power was held to be suspended in its taking effect to the extent of the lease only, and that the appointment was good for all beyond that.[2] The foregoing propositions may be further illustrated by analyzing one of the cases above cited, in which a tenant for life had, by will, a power to lease for twenty-one years, and by the same will the executor had a power to mortgage in fee or for years. The tenant made a demise of the land for ninety-nine years, if he should live so long, and then demised it under his power for twenty-one years. Subsequently, the executor executed the power to mortgage, by a lease for one thousand years. The mortgagee sued the lessee under the lease for twenty-one years, for rent which he claimed as reversioner. The tenant in defence set up the prior lease of ninety-nine years, and contended that the granting of that lease was a suspension of the power to lease for twenty-one years during the first term of ninety-nine years. This first lease took effect out of the life-estate of *the tenant for [*311] life, and not out of his power, and so there was then a reversion in him. Had the question of priority of right been between the lessee for ninety-nine years and the lessee for twenty-one years, in the absence of any estate created by the execution of the executor's power, the former must prevail, since the lessor could not by his second lease prejudice the one claiming under the first. But regarding the leases which were executed under the powers of executor and tenant for life by themselves, in their relation to each other, they were to be considered as if made by and contained in the will which created the powers. And therefore, as between

[1] Tud. Lead. Cas. 287; Goodright *v.* Cator, Doug. 477; Bringloe *v.* Goodson, 4 Bing. N. C. 734.

[2] Yelland *v.* Ficlis, F. Moore, 788; Snape *v.* Turton, Cro. Car. 472; Wms. Real Prop. 251; Tud. Lead. Cas. 288; Wilson *v.* Troup, 2 Cow. 237.

the lessee under the power in the tenant for life and the lessee under the power in the executor, the last, being later in point of time, was to be regarded as assignee of the reversion of the first, and entitled to the rent. The two leases, one for twenty-one and the other for one thousand years, are to be regarded as if made by the will itself, the latter being as to the former in the light of a reversion, and as such giving the latter lessee the common-law right to the rent of the prior lease. The tenant for life, moreover, so far as he had a right to make the lease of ninety-nine years, held this subject to these powers to lease and mortgage created by the will, and his lease for ninety-nine years was accordingly subordinate to them. Nor could the lease for ninety-nine years in a stranger be set up against this claim, for the making of that did not suspend the power in the life-tenant to lease for twenty-one years, which, therefore, was good as to every one except to override the term for ninety-nine years, and was consequently good as to the appointee of the executor under his power to mortgage.[1]

7. But so far as the execution of the power would operate to defeat an estate which the donee had, for a valuable consideration, created out of his own estate or interest, as, for instance, by the lessee for the twenty-one years setting up his lease against the lessee for ninety-nine years, the law suspends the power in order to prevent any one from working a fraud or injustice.[2]

8. It is no obstacle in the way of executing a power that the estate thereby to be created cannot be immediately enjoyed, or even be a vested estate at the time of the execution; nor would such a state of things of itself operate to defer or suspend the execution of a power. Thus where an estate was limited to S. for life, remainder to her son and his heirs, but if he died in her lifetime without issue, then to such person as S. should appoint, it was held, that, if S. made this appointment in the lifetime of the son, it would be a [*312] good one, and would take * effect upon and in event

[1] Bringloe *v.* Goodson, 4 Bing. N. C. 726.
[2] 4 Cruise, Dig. 221.

of the son's dying in her lifetime without issue.[1] But still the appointment should be immediately to the use of the person who is intended to take beneficially under the proposed execution of it, as otherwise the estate created might be left in another's hands, and the one intended to be benefited only have an equitable trust in it.[2]

9. But though an existing unexecuted power of revocation and appointment may operate to defeat an existing estate in the present holder of the land, though holding under the instrument creating the power, whenever the donee of the power may see fit to execute it, it is not deemed in law to render the estate of such holder a contingent one, but this is to all intents a vested estate, though liable to be divested by the execution of the power. And such would be the character of a remainder limited after an estate for life, though the tenant for life were clothed with a power of appointing remainders, and the former remainders over were limited by the deed creating the power, to the person named in default of such appointment, by the tenant for life. It would be a vested and not a contingent estate.[3]

10. It is a rule of universal application, that no limitation shall be deemed to constitute a springing use which can by any just construction be established as a contingent remainder.[4]

[1] Dalby *v.* Pullen, 2 Bing. 144; Tud. Lead. Cas. 546; Chance, Pow. § 402.

[2] Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4.

[3] Doe *v.* Martin, 4 T. R. 39; Chance, Pow. § 2749; Osbrey *v.* Bury, 1 Ball & B. 53; Watk. Conv. 268, Coventry's note; Braman *v.* Stiles, 2 Pick. 460; Fearne, Cont. Rem. 226; Cox *v.* Chamberlain, 4 Ves. 631; 4 Cruise, Dig. 146; Gorin *v.* Gordon, 38 Miss. 214.

[4] Burt. Real Prop. § 797; Southcote *v.* Stowell, 1 Mod. 237; Purefoy *v.* Rogers, 2 Saund. 388.

SECTION III.

POWERS APPLIED BOTH IN AMERICAN AND ENGLISH LAW.

1, 2. Provisions as to powers in the law of New York.
3. Equity adopts as to powers the rules existing prior to the statute of uses.
4. How far this is applied in creating estates of inheritance.
5. Power to appoint to a person implies a life-estate only.

1. As powers have been chiefly made use of in effecting family settlements which are comparatively infre-
[*313] quent in this * country, they have been rarely applied, though fully recognized here as forming a part of the American law. It therefore becomes necessary to know something of the subject as a branch of general jurisprudence, in order to apply some parts of the legislation of the country. Thus, in New York, it is declared that a devise of lands to executors or trustees to be sold or mortgaged, where these are not to receive the rents, shall vest no estate in the trustees, "but the trust shall be valid *as a power*, and the lands shall descend to the heirs or pass to the devisees of the testator, *subject* to the execution *of the power*.[1] Powers under marriage settlements are favorably construed and applied in the equity courts of Mississippi.[2]

2. So, many trusts are by that statute declared to be powers, no estate vesting in the trustees; and the third article of the Revised Statutes of New York, from the eighty-sixth to the one hundred and forty-eighth sections, is devoted to the subject of powers, but is too extended to admit of being incorporated into a treatise like this. Thus it is held, that, if A grants land to B in trust for such person as C shall appoint, it is a valid power in trust under this statute, by which, as a mere trust, it is void, and creates no estate in the trustee, inasmuch as there is no duty for him to do as to the estate. But if C were to make an appointment in favor of any one, the power vested by deed in the trustee would become opera-

[1] New York Rev. Stat. art. 2, § 68; Stat. at Large, vol. 1, p. 678, § 56; Lalor, Real Est. 180.

[2] Gorin *v.* Gordon, 38 Miss. 210

tive in him to convey the estate to the appointee. But in the case cited below, C having died without executing the power of appointment, the whole conveyance failed, and the estate remained in the grantor unchanged, but discharged of the power.[1]

3. Courts of law, wherever powers are recognized as existing under the statute of uses, adopt in respect to them the rules which prevailed in equity before that statute, and they are thus capable of being made the means of defeating, modifying, transferring, and varying, in every imaginable manner, any or all of the equitable interests which a conveyance may have originally described and limited.[2]

4. It is accordingly held, that, if the intention is clear, a power may enable one to make disposition of a fee, although no words of inheritance are used; as, where a testator gives a power to *sell* lands, the donee may sell the inheritance, because the testator gave the same power which he himself had.[3] Where an estate is given absolutely to such uses as a person shall appoint, without any prior limited estate, it is an estate in fee.[4] And this extends to deeds as well as to wills, by which powers of appointment are created. There is little if any difference *in the construction of deeds [*314] and wills on this point. A general power in a deed, as well as in a will, to limit "any estate or estates," will authorize the limitation of a fee or any less estate.[5] Thus, where by will a testator devised his lands to his wife for life, "and then to be at her disposal," provided she disposed of it after her death to any of her children, it was held she had an estate for life, and might by will create a fee in any of her children to whom she should appoint the estate.[6] In deeds, however, technical expressions are, in some cases, absolutely necessary, so that they cannot be supplied by others. So

[1] Hotchkiss *v.* Elting, 36 Barb. 38.

[2] Right *v.* Thomas, 3 Burr. 1446; Burt. Real Prop. § 125; 2 Flint, Real Prop. 544; Ren *v.* Bulkeley, Doug. 292.

[3] 1 Sugd. Pow. 476; Wilson *v.* Troup, 7 Johns. Ch. 34, 35; 4 Cruise, Dig. 136.

[4] Langham *v.* Nenny, 3 Ves. 467.

[5] Chance, Pow. §§ 1207, 1208; Liefe *v.* Saltingstone, 1 Mod. 190.

[6] Dighton *v.* Tomlinson, Com. 194, s. c. 1 P. Wms. 171.

that, in the cases above supposed, the one executing the power of creating an estate should define, by proper terms of limitation, whether it was a fee or a less estate, and what estate it was intended to be. In wills, technical expressions are never necessary.[1]

5. But if the power is to appoint to such "persons" as the donee may choose, it authorizes only a life-estate.[2]

SECTION IV.

HOW POWERS MAY BE CREATED.

1. By deed or by will, and either granted or reserved.
2. May be reserved in the body of a deed or in a separate instrument.
3. No precise form required; sufficient, if intent is expressed.
4. Important whether the instrument creates a power or an estate.
5. A deed may create a power as to one parcel, and an estate as to another.
6. When testator's intention is answered, the power ceases.
7, 8. Of naked powers, and those coupled with an interest.

1. POWERS may be created by deed or by will. They may be given to the grantee to be exercised over lands, &c., granted or conveyed at the time of the creation of the power, or they may be reserved to the grantor.[3]

2. If reserved, the reservation may be either in the body of the deed, or by means of an indorsement made thereon before its execution, or by a deed of the same date with the settlement, and there need be no counterpart to the deed.[4] And it may be remarked, though perhaps not coming strictly under the head of the creation of powers, that though, [*315] if a power is contained in a * deed limiting an estate to A to such uses as he should appoint, and, in default of appointment, to himself in fee, it was formerly much discussed whether the power was not merged in the fee, it is now settled that it is not, and that a general power of ap-

[1] Co. Lit. 271 b, Butler's note, 231. [2] 2 Flint, Real Prop. 549.
[3] Watk. Conv. 258, and Coventry's note; Burt. Real Prop. §§ 123, 172; 4 Kent, Com. 319.
[4] 1 Sugd. Pow. ed. 1856, 158.

pointment may co-exist with the absolute fee in the donee of a power.[1]

3. No precise form of words is requisite in creating a power. It is sufficient if the words indicate an intention to reserve or give the power. And this applies both to cases of powers created by deed and by will.[2]

4. But it becomes often exceedingly important to discriminate between the terms which create a power, and those which would confer an interest upon one; the difference being, so far as the party who ultimately derives a title to the estate is concerned, that in the latter case he takes immediately from the donee of the power and interest, in the former from the grantor himself, the donee being the medium through whom the estate is created. Mr. Chance, in the third chapter and third section of his work on Powers, has collected a large number of cases wherein this distinction has been exemplified, the most numerous of which, perhaps, have arisen under devises by which executors are directed to sell the lands of the testator. But these cases are too numerous to be repeated here. The same may be said of what the reader will find in Mr. Sugden's work on Powers, and the notes to the American edition of 1856,[3] where the American cases are also collected. It will be sufficient for the present to state, that the question in the several cases turns altogether upon the intention of the grantor or devisor, as expressed in, or to be gathered from, the whole will or deed.[4]

*5. In Bloomer *v.* Waldron, the court say: "There [*316] is no difficulty in seeing that a man may have a power coupled with an interest as to one estate, and a naked power as to another estate in the same land. For instance, the same instrument may give him power to sell a term for years and take the purchase-money for his own use, with power to sell the reversion for the benefit of another. The latter

[1] Sugd. Pow. ed. 1856, 105; Maundrell *v.* Maundrell, 10 Ves. 255–257; 4 Greenl. Cruise, Dig. 241, n.; 6 Greenl. Cruise, Dig. 490.

[2] 1 Sugd. Pow. 118.

[3] 1 Sugd. Pow. ed. 1856, 120–134, and notes.

[4] 4 Kent, Com. 319; Peter *v.* Beverly, 10 Pet. 532; Ladd *v.* Ladd, 8 How. 10; Jackson *v.* Schauber, 7 Cow. 187; Walker *v.* Quigg, 6 Watts, 87; Jackson *v.* Jansen, 6 Johns. 73; Sharpsteen *v.* Tillou, 3 Cow. 651; Jameson *v.* Smith, 4 Bibb, 307.

would be none the less a naked power because the former vested a title in the donee." [1]

6. And it may be stated in this connection, that, where it appears that the intention of a testator in creating a power has been answered, the power itself will cease.[2]

7. It may also be stated in explanation, and perhaps as a limitation of the above propositions, that as technical words are so essential to the creation of estates by deed, and their import is so generally understood, a question rarely arises upon a deed, whether the party takes an actual estate or not. Such questions usually relate to wills.[3]

8. One test that is given in some of the cases for distinguishing a naked power from one coupled with an interest is, whether the donee of the power is to have possession of that to which his power relates. If he is, he is considered to have an interest, otherwise a mere naked power.[4] Where an executor, guardian, or other trustee, is invested with the rents and profits of land, with a power of sale for the use of another, it is still an authority coupled with an interest, and would survive.[5]

[1] Bloomer *v.* Waldron, 3 Hill, 361, 365.

[2] Jackson *v.* Jansen, 6 Johns. 73; Sharpsteen *v.* Tillou, 3 Cow. 651.

[3] Sugd. Pow. ed. 1856, 153.

[4] Clary *v.* Frayer, 8 Gill & J. 403; Gray *v.* Lynch, 8 Gill, 403. See *post*, p. *324.

[5] Peter *v.* Beverly, 10 Pet. 533.

SECTION V.

BY WHOM AND HOW A POWER MAY BE EXECUTED.

1. Most persons may execute powers; infants, femes covert, &c.
2. Law very strict as to mode of executing a power.
3, 4. Illustrations of strict observance of the terms of a power.
5. How power to sell may not be executed.
6, 7. How far a power to appoint to children extends.
8. Power by will or by legislative act a common-law power.
9. Execution of a power of appointment, only raises a use.
10. Of the seisin requisite to serve a power.
11. Distinction between these powers and powers of attorney.
12. Appointor, in a power, a mere instrument.
13. Appointee takes under the original deed as if there named.
14. In executing a power, no express reference to original deed required.
15. Example of appointee taking under original deed.
16. Donee of a power may create estate to himself.
17. Execution of a power identical with the creation of a use.
18. When a power may be delegated.
19. When an assignee may execute a power.
20. Of executing powers by two donees.
21. When powers to two or more donees survive.
22. Of powers in executors to sell.
23. Powers implying personal confidence.
24. Powers to persons as a class, as "trustees," &c.
25. When the rule as to a class applies to executors.
26. When power of sale in executors is or is not a naked one.
27. Power under a will is a trust in chancery.
28. Effect of death of one creating a power of attorney.
29. When a power is coupled with an interest.
30. Power coupled with an interest assignable.
31. When a donee of a power may, and when he must, execute it.
32. Of the dominion over property of one having a power.
33. When deed of donee passes his own estate, or executes his power.

1. Any person who is competent to dispose of an estate of his own may execute a power over land.[1] If a power is simply * collateral, an infant may execute it.[2] And [*317] a *feme covert* may execute a power, whether collateral, appendant, or in gross, the concurrence of her husband being

[1] 1 Sugd. Pow. ed. 1856, 181; 4 Kent, Com. 324.

[2] 4 Kent, Com. 325. If the power is to be executed by will, as an infant cannot make a will, it seems he cannot execute the power. Sugd. Pow. ed. 1856, 211.

in no case necessary. She may even execute it in favor of her husband.[1] In Doolittle *v.* Lewis, a mortgagor, living in New York, made a mortgage of lands lying in New York, to his creditor in Vermont, containing a power of attorney to him, his executors, administrators, or assigns, to sell the premises upon default of payment. The mortgagee having died, his administrator, appointed by a court of Vermont, proceeded to sell the mortgaged estate; and the question was, if such administrator could execute such power, when he could not prosecute any suit in the State of New York by virtue of letters of administration granted in Vermont. The Chancellor held the sale good, on the ground that the administrator answered the description of the person to whom, by the convention of the original parties, the power was committed, and its exercise was a matter of contract which did not involve the question of jurisdiction of the Vermont court in appointing an administrator to act in another State. The title of the purchaser was the same as if it had been created by the original deed.[2] The law of the *situs* of the subject of the power controls the execution of the power.[3]

2. When the mode of executing a power comes to be considered, it will be found, that, in order to the execution being valid, the law is exceedingly strict in requiring a precise compliance with the direction of the donor, as expressed in his deed or will; though, as hereafter explained, equity sometimes interposes to give validity to a defective execution of a power. The law itself prescribes no particular ceremonies to be observed in the execution of a power, unless it is to be by will, in which case the requisite formalities of attestation must be complied with. The terms of the power may direct

[1] 1 Sugd. Pow. 182; 4 Kent, Com. 325; Ladd *v.* Ladd, 8 How. 27; Rush *v.* Lewis, 21 Penn. St. 72, where the wife under a power appointed an estate to her husband by last will, this was held to vest the legal estate in him. Doe *v.* Eyre, 3 C. B. 578, s. c. 5 C. B. 741; Bradish *v.* Gibbs, 3 Johns. Ch. 523; Hoover *v.* Samaritan Soc., 5 Whart. 445; Barnes *v.* Irwin, 2 Dall. 201; Leavitt *v.* Pell, 25 N. Y. 474; Wright *v.* Tallmadge, 15 N. Y. 307; Wood *v.* Wood, L. R. 10 Eq. Cas. 220.

[2] Doolittle *v.* Lewis, 7 Johns. Ch. 45, 48. See Hutchins *v.* State Bank, 12 Met. 425, where the court say: "Whether the law would go to that extent here, may perhaps be questioned"

[3] Bingham's Appeal, 64 Penn. St. 345.

it to be exercised by a note in writing, or by will, or its execution may be clogged with any ceremonies which the caprice of the one creating it may see fit to impose; all of which must be strictly complied with, however unessential or unimportant they may appear in themselves to be.[1]

3. Thus, by way of a brief illustration, a power to a husband and wife cannot be executed by the survivor;[2] and a power to appoint by deed cannot be executed by will, nor *vice versa*. If, however, the power be a general one, it may be executed in either way; and if it is to be executed by "any writing," or "any instrument," it may be by will.

4. It was held in one case, that where the power was required * to be exercised by a writing, "under [*318] hand and seal attested by witnesses," it was not enough that witnesses actually attested it: in order to be valid, the attestation clause of the deed should state that it was so attested,[3] and this was afterwards reaffirmed.[4] But in a more recent case, the former decisions seem to be overruled, and an actual attestation will be sufficient, though not stated to be done as such in an attestation clause.[5] And such seems to be recognized as the law in the United States, and the fact of the witnesses having attested the instrument may be established *aliunde*.[6]

5. Ordinarily a power to sell does not confer a power to mortgage.[7] Where the power was in A to appoint by will

[1] Watk. Conv. 262, 263, Coventry's note; 1 Sugd. Pow. ed. 1856, 211; Habergham *v.* Vincent, 2 Ves. 231; Longford *v.* Eyre, 1 P. Wms. 740. See Hawkins *v.* Kemp, 3 East, 410, 430, where several illustrations will be found in the cases cited; Wms. Real Prop. 247, 249; 1 Sugd. Pow. ed. 1856, 250, 278; Andrews *v.* Roye, 12 Rich. 546; Bentham *v.* Smith, Chev. Eq. 33.

[2] Watk. Conv. 261, and Coventry's note; *Ex parte* Williams, 1 Jac. & W. 93.

[3] Wright *v.* Wakeford, 17 Ves. 454.

[4] Wright *v.* Barlow, 3 Maule & S. 512.

[5] Vincent *v.* Bishop of Sodor and Man, 5 Exch. 683; Burdett *v.* Spilsbury, 6 Mann. & G. 386. See Wms. Real Prop. 248.

[6] Ladd *v.* Ladd, 8 How. 30–40.

[7] Bloomer *v.* Waldron, 3 Hill, 361; 1 Sugd. Pow. 513, ed. 1856. Though a power to sell and *raise money* implies a power to do this by mortgage, while a power generally "to raise the sum out of the estate is an authority to sell." 1 Sugd. Pow. 513; 4 Kent, Com. 331; Leavitt *v.* Pell, 25 N. Y. 474; Zans *v.* Kennedy, 73 Penn. St. 182. "An absolute and unrestrained power to sell includes a power to mortgage."

how the estate, after her death, should be distributed among her children, it was held that she had no power to sell the estate, or authorize any other person to sell the same. Nor can a power to appoint by will be executed by a deed.[1] And where the power is to sell for a specific sum, it means a cash sale, and not one for approved notes, unless there is something in the power or usage of trade to manifest a different intention.[2]

6. So ordinarily a power to appoint to children does not authorize an appointment to grandchildren.[3] So a power to appoint to children alone, and executed by appointment to trustees to A, who was a child, or to his children, in their discretion, was held to be bad as an appointment, and a provisional appointment to B, another child, took effect.[4] In some extraordinary cases, however, where there were no children, circumstances have been held strong enough to indicate an intention on the part of the one who created the power to include grandchildren under the general term *children*.[5]

7. But "issue" is a term broad enough to embrace all descendants, unless it is limited to children by the connection in which it is used.[6]

[*319] 8. A power given by a will or by virtue of a legislative act *is, as a general proposition, a common-law authority. Thus where one by will gave certain legacies, and gave the residue of all his estate to certain persons named, but gave his executors a power to sell the estate and give deeds to convey the same, it was held that they might do so, and divide the proceeds, although there was an express gift of the estate itself to the devisees named.[7] So is a power of attorney, by which one acts in the

[1] Alley *v.* Lawrence, 12 Gray, 375; Moore *v.* Dimond, 5 R. I. 130.

[2] 4 Kent, Com. 331; Ives *v.* Davenport, 3 Hill, 373.

[3] 2 Sugd. Pow. ed. 1856, 253, and note of American cases; 4 Kent, Com. 345; Horwitz *v.* Norris, 49 Penn. St. 217.

[4] Wallinger *v.* Wallinger, L. R. 9 Eq. 301.

[5] 2 Flint, Real Prop. 550; Tud. Lead. Cas. 306, 307; 4 Kent, Com. 345, note; Wythe *v.* Thurlston, Ambl. 555.

[6] Wythe *v.* Thurlston, Ambl. 555; Freeman *v.* Parsley, 3 Ves. 421; 2 Flint, Real Prop. 550.

[7] Crittenden *v.* Fairchild, 41 N. Y. 289; Kinnier *v.* Rogers, 42 N. Y. 531.

name and stead of another.[1] But it is not of such powers that this work is intended to treat, but only of such powers as derive their force and effect from the statute of uses, though it has sometimes been held that powers created by a last will may come within this class.[2]

9. With this restriction as to the nature of the powers here considered, it is important to bear in mind that an appointment under a power operates not as a conveyance of the land itself, but as a creation or substitution of a use to which the statute annexes the seisin.[3] It is therefore always necessary, when creating a power, to raise or create a seisin in some one which shall be ready to serve the use when created by such appointment; and, to that end, the seisin which is raised for the purpose must be commensurate with the estates authorized to be created under the power. If an estate were therefore conveyed to A, to such uses as B should appoint, B could appoint no greater estate in the use than the estate in A; and if the latter were for life only, B could not appoint to C in fee.[4]

10. The matter of seisin as connected with powers in wills perhaps can be as readily disposed of by an extract from Mr. Sugden's work on Powers as in any other way: "Where, therefore, a seisin is raised by the will, and it operates, the appointment will create a use, and there cannot be a use upon a use. But where there is no seisin to serve the power, but the testator devises at once, for example, that A shall sell, upon a sale to B the latter takes by force of the will; and as the will itself might have raised a seisin to serve uses, so it may be said the testator may authorize such seisin to be created, and therefore, if such an intention is shown or can be collected from the power, uses may be declared of B's seisin. The case *appears to resolve itself into the [*320] intention of the creator of the power."[5]

[1] 1 Sugd. Pow. ed. 1856, 1, 171, 174.

[2] 1 Sugd. Pow. ed. 1856, 171, note, 240; Chance, Pow. § 100.

[3] 2 Flint, Real Prop. 545; Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4; 4 Cruise, Dig. 220; 2 Crabb, Real Prop. 725.

[4] 1 Sugd. Pow. ed. 1856, 175; Gilbert, Uses, Sugd. ed. 127, n.; 1 Wood. Conv. 498; 4 Kent, Com. 323.

[5] 1 Sugd. Pow. ed. 1856, 240. See 2 Prest. Abst. 347.

11. "Powers," he adds, "under wills and deeds, are both distinguishable from a power to convey under a letter of attorney. The estates raised by the execution of a power, whether it be created by a deed or will, take effect as if limited in the instrument creating the power." [1] It may be added from the same authority, that, "in case of a deed creating a power, the seisin or interest to serve the estate is actually raised by the deed itself, and the estates limited under the power accordingly derive their essence from that seisin." [2]

12. The appointor is merely an instrument; the appointee is in by the original deed.[3]

13. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee as his assignee.[4] This was held in one case where the deed of appointment was executed nine years after the deed creating the power.[5]

14. Although, in executing a power, the deed or will should regularly refer to it expressly, and it is usually recited, yet it is not necessary to do this, if the act shows that the donee had in view the subject of the power at the time.[6] The courts are, as a general thing, more inclined than formerly to treat the disposition of an estate by will as an execution of a power on the part of the testator, where he has such a power, although, in terms, it be a devise of his own estate. By the English statute of 7 Wm. IV. and 1 Vict. c. 26, § 27, such a devise will be taken to be in execution of such a power unless a contrary intention appear in the will. The two following cases may illustrate the application of these two different rules. In one, a widow was authorized by her husband's will to devise the estate by her will to their children, as she should deem best. She devised it, but treated it in her will as her own estate, making no reference to the power in the

[1] 1 Sugd. Pow. ed. 1856, 242. [2] 1 Sugd. Pow. ed. 1856, 242.

[3] Watk. Conv. 271; Doolittle *v.* Lewis, 7 Johns. Ch. 45.

[4] 2 Crabb, Real Prop. 726, 741; 2 Sugd. Pow. ed. 1856, 22; 2 Prest. Abst. 275.

[5] Braybrook *v.* Attorney-Gen., 9 H. L. Cas. 150, 166.

[6] 1 Wood. Conv. 498, n.; 4 Kent, Com. 334; 1 Sugd. Pow. ed. 1856, 232, and note; Story, Eq. Jur. § 1062 a, and note.

husband's will, and it was held not to be a good execution of the power.[1] In the other, the testatrix created a trust by conveying her estate to trustees to hold for her benefit during her life, and, upon her decease, to convey it to such person as she should by her last will designate; or, upon her dying intestate, to her heirs at law. By her last will, she devised the estate without any reference to its being in execution of this power. But the court held it to be a good execution of the power, and therefore so far passed the estate that the trustees were decreed to convey according to the devise. The English cases are reviewed by the court, who adopt the rule stated in Blagge *v.* Miles, as to when a will or other instrument is to be construed as an execution of a power: 1st, where there is a reference in the will or instrument to the power; 2d, where there is a reference to the property which is the subject on which it is to be executed; 3d, where the provisions in the will or instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity, or would not have operation except as an execution of the power.[2] And if the instrument by which the appointment is made conforms to the power, a reference to the power will determine what is thereby granted, and the estate therein intended to be limited.[3]

15. As an illustration of the fact that an appointee takes under the original deed, a husband, though he cannot convey to his wife, may, if he has a power of appointment given him, appoint to her directly, because her estate arises out of the original seisin of the grantor. And the same, *mutatis mutandis*, * would be true, if the wife, under a power, [*321] appointed to her husband.[4]

16. And where the donee has a general power of appointment, as he may, if he elects so to do, vest a fee in himself or any one else, it is apprehended that the nature of the estate, whether a life-estate or a fee, for instance, intended to

[1] Doe *v.* Vincent, 1 Houst. 416, 427.

[2] Amory *v.* Meredith, 7 Allen, 397; Blagge *v.* Miles, 1 Story, 426; 4 Kent, 335.

[3] Jackson *v.* Veeder, 11 Johns. 169; Ren *v.* Bulkeley, Doug. 292; 2 Prest. Abst. 272, 273, 275, 278.

[4] 2 Sugd. Pow. ed. 1856, 24.

be limited, is to be determined by the terms made use of in the instrument executing the power, according to the ordinary rules of construction applied to wills or deeds declaring or transferring uses.[1]

17. So exact is the analogy, or rather the identity, between the creation of a use and the execution of a power of appointment to uses, that, where one under such a power appointed to B and his heirs to the use of C and his heirs, B was held to be the *cestui que use* in whom alone the use was executed. The use declared in favor of C gave him only an equitable title as *cestui que trust*.[2]

18. If there is a general conveyance to A to such uses as he shall appoint, he may delegate the power to B by conveying to such uses as B shall appoint;[3] though, if the power repose personal confidence and trust in the donee to exercise his own judgment and discretion, he cannot refer the execution of the power to another, upon the principle *delegatus non potest delegare*.[4] The ground upon which the first proposition rests is this: Estates arising from the execution of powers are in the nature of springing uses, and the seisin which is to supply them is not disturbed until some use is actually raised. Now, as the case supposed did not imply that there was any confidence reposed in A for the benefit of another when the power was created, no use was raised by A's conveyance if this did *not declare any final beneficiary, and the statute was not called into operation until B designated the use.[5]

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19. If a power be limited to a donee and his assigns, an execution of it by his assignee will be good, and this term would include a devisee of the donee.[6]

20. Numerous questions have arisen, and some of them of considerable difficulty, in respect to the execution of powers where two or more persons are named as donees. Ordinarily,

[1] 2 Crabb, Real Prop. 743; Wms. Real Prop. 220.

[2] 2 Prest. Abst. 248; 1 Sugd. Pow. ed. 1856, 229.

[3] Watk. Conv. 265, Coventry's note; 4 Cruise, Dig. 212; 1 Sugd. Pow. ed. 1856, 216.

[4] 1 Sugd. Pow. ed. 1856, 214; 4 Cruise, Dig. 211; Broom's Max. 665.

[5] Watk. Conv. 265.

[6] 4 Cruise, Dig. 211; 1 Sugd. Pow. ed. 1856, 215.

in such a case, all the donees must join in the execution of the power. And this is always true unless the contrary is expressed.[1] In Montefiore *v.* Browne, a power of revocation having been given to D. G. and D. B., and D. B. died before it was executed, it was held that D. G. could not execute it.[2]

21. But where the power is to several persons having a trust capacity, or an office in its nature like that of the executors of a will, susceptible of survivorship, and any of them die, the power will survive unless it is given to them *nominatim*, as to A B and C D, naming them. In the latter case, the power would not survive unless it was coupled with an interest in the donees of the power.[3] Where an estate was devised to trustees with power to sell, and authorized the surviving or remaining trustees, if either of them died or refused or relinquished the trust, to appoint a person in his place as trustee, by deed, with the approbation of the judge of probate, with the same powers as were given the trustees under the will, and this was done by the appointment of a new trustee, the court inclined to the opinion that such trustee became thereby vested with the legal estate by force of the devise. But if he did not, the survivors of the original trustees might execute the power as a naked trust.[4] But powers given to executors by will which are foreign to their duties as executors do not pass to an administrator unless the testator's intention to that effect is clear.[5]

22. In the case of executors, moreover, this nice distinction is recognized and prevails, that if the devise is to them to sell the estate, or for it to be sold, they take a trust of the estate with a power to sell. Whereas, if the devise is that the executors shall sell, it is a naked power, and must be executed by all; while in the other case it is not a naked power, and

[1] 4 Greenl. Cruise, Dig. 211, n.; Co. Lit. 113, Hargrave's note, 146; Story, Eq. Jur. § 1061; Franklin *v.* Osgood, 14 Johns. 553.

[2] Montefiore *v.* Browne, 7 H. L. Cas. 261, 267.

[3] Co. Lit. 113 a, Hargrave's note, 146; Story, Eq. Jur. § 1062; Tainter *v.* Clark, 13 Met. 220, 225; Peter *v.* Beverly, 10 Pet. 564; 1 Sugd. Pow. 144, 146; *ante*, p. *197; Loring *v.* Marsh, 27 Law Rep. 377, 391.

[4] Webster Bank *v.* Eldridge, 115 Mass. 424; Ellis *v.* Boston, H., and Erie R. R., 107 Mass. 1–13.

[5] Ingle *v.* Jones, 9 Wall. 486.

may be executed by such of the executors as execute the will.[1] If a power is given by will to a trustee, and he neglects to exercise it, the execution of it devolves upon the court; but if the trustee dies before the time prescribed for the execution of the trust, the trust fails, and the testator is to be considered as dying, thus far, intestate.[2]

23. If the authority to sell be given as a trust to the same person named as executor, his resigning his trust as executor does not impair his power to sell.[3] And if the power [*323] be *accompanied by a personal confidence and trust in the donee or donees, he or they alone can execute it; nor can it pass to others; it must be executed by the persons named, unless an authority to substitute another be expressly given.[4]

24. Where the power is given to several persons as a class, under a term implying more than one person as to "trustees," "sons," "survivors," and the like, it may be executed by the survivors so long only as there is more than one of them.[5]

25. This would not apply to executors; for if the power is not to them, *nominatim*, a single survivor of the number might act. But upon the death of an executor, an administrator with the will annexed could not, as his successor, execute a power to sell lands.[6]

26. If a will charges a trust upon land, and directs the executors to execute it, and a due execution of this requires a sale to be made, the executors may make such a sale, although they have no interest in the estate beyond doing an act that is necessary to execute the will. Such a power is not properly a naked power, which the donee may execute or not at

[1] Osgood *v.* Franklin, 2 Johns. Ch. 19, 20; Shep. Touch. Hill, ed. 448; Bergen *v.* Bennett, 1 Caines, Cas. 16; Franklin *v.* Osgood, 14 Johns. 553, 562; 4 Kent, Com 320.

[2] Ray *v.* Adams, 3 M. & Keene, 237. [3] Tainter *v.* Clark, 13 Met. 220, 227.

[4] Cole *v.* Wade, 16 Ves. 27; Tainter *v.* Clark, 13 Met. 220, 226.

[5] 1 Sugd. Pow. ed. 1856, 146; Story, Eq. Jur. § 1062, n.

[6] Story, Eq. Jur. § 1062; 1 Sugd. Pow. ed. 1856, 146; Tainter *v.* Clark, 13 Met. 220, 226. *Contra*, Drayton *v.* Grimke, 1 Bail. Eq. 392. Where power is given to an executor by will to sell to pay debts, the sale may be made by an administrator with the will annexed. See also Brown *v.* Armistead, 6 Rand. 593, under a statute of Virginia.

his option; it is coupled with a trust or trusts which require the execution of the power. And a court of equity will not permit any accident, neglect of the donee, or other cause, to disappoint the interest of those who are entitled to the contemplated benefit under it.[1] And in such a case, the power survives. But such a power must be executed by all the trustees who are qualified to act. It cannot be delegated to a stranger or an attorney, nor can one executor act for the others.[2]

27. Every power given in a will is considered, in a court of chancery, as a trust for the benefit of a person for whose use the power is made, and as a devise or bequest to that person.[3]

*28. The power given by a letter of attorney to [*324] make a sale of lands ceases with the death of the one who gives it. It would simply be an absurdity for one, assuming to act as an attorney of another, to execute a deed in a dead man's name. So a power of attorney is revocable, although, in terms, irrevocable. But where the power is coupled with an interest, it survives the donor, and is not revocable by him who creates it, during his lifetime. The donee of the power executes it in his own name, independent of the existence of the donor.[4] And a power to sell and convey a fee may be good and effectual, although contained in a mortgage for life.[5]

29. A power is not coupled with an interest merely because the donee has, for instance, an interest in the proceeds of the sale. To make a power irrevocable, unless expressly declared

[1] Leeds *v.* Wakefield, 10 Gray, 517; Greenough *v.* Welles, 10 Cush. 576; Gibbs *v.* Marsh, 2 Met. 243.

[2] Osgood *v.* Franklin, 2 Johns. Ch. 21; Franklin *v.* Osgood, 14 Johns. 562, 563; Zebach *v.* Smith, 3 Binn. 69; Berger *v.* Duff, 4 Johns. Ch. 368; Peter *v.* Beverly, 10 Pet. 565; Story, Eq. Jur. § 1062; Hertell *v.* Van Buren, 3 Edw. Ch. 20; *ante*, p. *206.

[3] Hunt *v.* Rousmaniere, 2 Mason, 244, s. c. 8 Wheat. 207; 2 Sugd. Pow. ed. 1856, 158.

[4] Bergen *v.* Bennett, 1 Caines, Cas. 15; Hunt *v.* Rousmaniere, 2 Mason, 249, s. c. 8 Wheat. 203; Wilson *v.* Troup, 2 Cow. 236; *ante*, vol. 1, p. *499; Mansfield *v.* Mansfield, 6 Con. 562.

[5] MacGregor *v.* Gardner, 14 Iowa, 340; Story, Agency, § 476; Sedgwick *v.* Laflin, 10 Allen, 430.

so, there must be an interest in the thing to be disposed of or managed. A sharing in the profits of sale is not enough.[1] The interest must be in the land itself like a title to land. Thus in the cases of Bergen *v.* Bennett, and Wilson *v.* Troup, the mortgagee had a power of sale which was held not to determine with the death or alienation of the estate by the mortgagor. In Hunt *v.* Rousmaniere, Chief Justice Marshall thus defines what is meant by "a power coupled with an interest:" "Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself; in other words, the power must be ingrafted *on an estate* in the thing." After stating that a power to A to sell for his own benefit would not give him an interest, nor would it if his power was to sell for the benefit of B, he adds: "A power to A to sell for the benefit of B, ingrafted on *an estate conveyed* to A, may be exercised at any time, and is not affected by the death of the person who created it. It is then a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is therefore not dependent on the life of the person who created it.[2]

30. Such a power of sale may be assigned to another person by a conveyance of all the interest of the donee of the [*325] power, *and may be exercised by such assignee. But it is not susceptible of division; and therefore, if, for instance, a mortgagee with such a power were to sell a part of the estate mortgaged, the power remains in himself alone, and he only can exercise it.[3]

31. From the foregoing propositions and authorities, certain important principles are established in relation to the execution of powers, among which are, 1st. If the power be simply one in which no person is interested except the donee, it is a

[1] Hartley & Minor's Appeal, 53 Penn. 212; Mansfield *v.* Mansfield, *sup.*

[2] *Ante*, vol. 1, p. *494; vol. 2, p. *316.

[3] Wilson *v.* Troup, 2 Cow. 236, 237.

matter of election on his part whether to exercise it or not. No court will interpose to compel him to do so.[1] If the power to create an estate be a mere naked one, a failure to execute the appointment defeats the estate. Bare powers are never imperative, but depend upon the will of the donee. But if the power be a trust, equity will enforce its execution. And if the donee do not execute it, a court of equity will not permit the estate dependent on the discharge of such trust or imperative duty to fail for want of a trustee, for his default.[2] 2d. But if the power be coupled with a trust in which other persons are interested, as a power to executors to sell to pay debts, a court of equity regards it as a duty in the donee, and will compel its execution.[3] 3d. If the power is coupled with an interest, the execution of it is not only a matter of right and election in the donee, but the power becomes annexed to the estate, and passes with it to an assignee of the donee.[4]

32. But, after all, it will have been perceived that even powers of appointment, viewed in regard to the individuals who are to exercise them, are a species of dominion over property quite distinct from that free right of alienation which is annexed to every estate.[5]

33. Instances have already been mentioned of one having an estate in lands, and also a power to appoint the same to uses, or to sell, and the like. In such cases, if he sells the land without referring to his power, it will be construed to be a conveyance of his interest, and not an execution of the power. The land passes by virtue of his ownership.[6] But if he has no such interest, and the instrument by which he assumes to pass the * estate conforms to the re- [*326] quirements of the power, it will be deemed to be an execution of the power, though no reference to the power is made in such instrument. The question, however, in these cases becomes one of intent, and intention when shown will govern.[7]

[1] 1 Sugd. Pow. ed. 1855, 158; Sedgwick *v.* Laflin, 10 Allen, 432.

[2] Gorin *v.* Gordon, 38 Miss. 214, 215; Neves *v.* Scott, 9 How. U. S. 196, 213.

[3] Story, Eq. Jur. § 1062.

[4] Wilson *v.* Troup, 2 Cow. 236.

[5] Wms. Real Prop. 249.

[6] Hay *v.* Mayer, 8 Watts, 203; Jones *v.* Wood, 16 Penn. St. 25; Clere's case, 6 Rep. 18; 1 Sugd. Pow. ed. 1856, 432; Den *v.* Roake, 5 B. & C. 720; Probert *v.* Morgan, 1 Atk. 440; Co. Lit. 271 b, Butler's note, 231; 4 Cruise, Dig. 212.

[7] White *v.* Hicks, 33 N. Y. 392, 404; Blagge *v.* Miles, 1 Story, 426.

SECTION VI.

OF EXCESSIVE OR DEFECTIVE EXECUTION OF POWERS.

1. In what the execution of a power may be excessive.
2. Doctrine of *cy-pres*.
3. Rule applicable to excessive execution of a power.
4. When a second estate is accelerated by the first being void.
5. Appointing a less estate than that in the power, good.
6. Conditions not authorized by the power, void.
7. When an excess of execution does not affect.
8. Of the time when powers should be executed.
9. Effect of priority of execution where there are several powers.
10. Donee cannot revoke an executed use unless he reserves the power.

1. From the strictness required by law in the mode of executing a power, a question often arises, whether a donee in undertaking to execute this power has not exceeded it; and if so, how far the execution is good within the limits of his power. This excess may be in including objects not intended to be embraced in the power, or in the quantity or amount of the subject-matter of the appointment, or in imposing conditions in the execution of the power which it does not warrant.[1] The following is an example of an excess in the execution of a power, which, to that extent, was void: A. by will had a power to appoint an estate to the children of J. in such proportions and estates as the appointor should direct. He appointed to John for life, with a power to appoint to such uses as he should think proper; and, in default of such appointment, it was to go to his heirs. It was held, that so much of the exercise of this power as gave John a power to appoint was excessive and void. J. could appoint to the children, but could not authorize these, as appointees, to appoint further.[2]

2. A principle of construction applicable to wills, but not to deeds, called the doctrine of *cy-pres*, is to be taken in connection with the present inquiry, and is this: If the testator have a general intent, which he undertakes to carry out by

[1] Tud. Lead. Cas. 306; 2 Sugd. Pow. ed. 1856, 55.
[2] Wickerman *v.* Savage, 58 Penn. St. 371.

his will, and, in applying this to the particular object expressed in his will, so does it as to defeat his general intent, because the will cannot operate in the manner prescribed, courts will still so construe it as to carry out this general intent. As if, for instance, a testator limit an estate to the unborn son of his son J., and after the death of such unborn son to the sons of the latter in tail. This last limitation is too remote to be effectual in that form. But the general intent being to limit the estate first to the unborn son, and then to his issue, the courts consider the first limitation as an estate-tail in the unborn son, instead of an estate for life, as the will declares it to be.[1] Upon a like principle, where a testator by his devise authorized his executor to sell his lands and to apply the proceeds in a way indicated in his will, the sale to be made after the death and only by consent of a majority of his children, and they all died in the lifetime of the wife, it was held that he might nevertheless convey the land, it being a *trust-power*, the execution of which was necessary to the disposal of the estate, the condition, in the judgment of the court, being annulled by the death of the children.[2]

*3. Now, where the doctrine of *cy-pres* does not [*327] apply, the rule as to the excessive execution of a power seems to be, that if the excess can be separated from what is within the legitimate exercise of the power, and if the latter part is not made to depend upon that which is void, or if the objectionable part is distinct from and independent of that which is authorized to be done, the execution, so far as it is conformable to the power, will be sustained, and beyond that will be void.[3] Thus where the appointment was to several, a part of whom only could take, it was held to be a good appointment as to these.[4] So where the power was to charge £7,000, and it was executed by charging £8,000, it was held to be good for the first-mentioned sum.[5]

[1] 2 Sugd. Pow. ed. 1856, 60, 61; Wms. Real Prop. 229, 230; Robinson *v.* Hardcastle, 2 T. R. 241.

[2] Leeds *v.* Wakefield, 10 Gray, 514, 519.

[3] 2 Sugd. Pow. ed. 1856, 62, 75; Tud. Lead. Cas. 308; Crompe *v.* Barrow, 4 Ves. 681; Warner *v.* Howell, 3 Wash. C. C. 12; 4 Cruise, Dig. 205.

[4] Sadler *v.* Pratt, 5 Sim. 632.

[5] Parker *v.* Parker, Gilb. Eq. 168.

4. As a general proposition, if, in executing a power, an estate is limited to take effect after a previous one, and the limitation as to such prior estate is void, the time of the subsequent one will be accelerated, and be as if the void limitation had not been made at all.[1] But this rule does not apply where the previous limitation is void by reason of its violating the rule of law against perpetuities, as where the limitation in execution of a power was to an unborn child, then to the children of such child, and, upon failure of issue, over to A B. The child, in this case, was the object of the power; but the children were not, so that, as to them, the execution of the power was void. A B was an object of the power; but as his estate was only to take effect upon the failure of issue of the child, and this, as will be shown hereafter, was so remote as to make a limitation dependent upon it void, it was held that the limitation to A B would be void accordingly, because it was only intended that A B should take upon the assumption that the previous appointees were capable of taking, [*328] and that he should * take only when they had failed by a failure of issue.[2] In such and similar cases, "a subsequent limitation under a will or an appointment will not be accelerated merely because the previous limitation proves bad, but the whole, so given, must go as in default of any appointment."[3] Nor does it make any difference that the objects of the prior limitation never came *in esse;* the validity of the appointment is referred to the time of making it.[4]

5. The appointment of a less estate under a power than what the donee might have created is not thereby rendered invalid.[5]

6. If a donee of power, in undertaking to execute it, annex conditions to the estate he creates which are not author-

[1] Fuller *v.* Fuller, Cro. Eliz. 422; Cheddington's case, 1 Rep. 154 b; Goodright *v.* Cornish, 1 Salk. 226; Thornby *v.* Fleetwood, 1 Strange, 369.

[2] Crompe *v.* Barrow, 4 Ves. 681; Brudenell *v.* Elwes, 1 East, 442; Burt. Real Prop. §§ 795, 796.

[3] Bristow *v.* Warde, 2 Ves. 350, Sumner's note, 1.

[4] Gee *v.* Audley, cited in Routledge *v.* Dorril, 2 Ves. 363. See also the same volume of reports, page 350, note. And see, upon the general subject, Beard *v.* Westcott, 5 B. & Ald. 801; Tud. Lead. Cas. 308, 313; 2 Flint, Real Prop. 549.

[5] 4 Cruise, Dig. 205.

ized by his power, the estate will be absolute, and the conditions void.[1]

7. When in the execution of a power the requirements prescribed in its creation have been complied with, and something *ex abundanti* added which is improper, the execution will be held good by the rules of equity, and only the excess will be void. But where there is not a complete execution of a power, and the boundaries between the excess and the execution are not distinguishable, it will be bad.[2] Thus, if the donee is authorized by his power to make a lease for twenty-one years, and he makes one for forty, though by law such lease would be wholly void, equity will sustain it to the extent of twenty-one years.[3] But had the devise been for two separate and distinct terms, one for twenty-one and the other for nineteen years, * neither law nor [*329] equity would sustain the second, though either would hold the first to be good.[4]

8. In speaking thus far of powers, those of appointment and revocation have been frequently mentioned; and it may be added, questions as to the time when they may be executed, as well as to the effect of their execution, often arise, of a different character from those which have already been considered. Much will of course depend upon the nature of the powers which a donee is authorized, by the instrument creating them, to execute. They may, for instance, as in Digges' case, be to be executed at different times over different parts of the estate. In that case the grantor covenanted to stand seised to the use of himself for life, remainder to the use of his son in tail, with a proviso that it should be lawful for him to *revoke* any of the uses or estates, and to limit new uses. It was held, that under this general power he might

[1] 2 Sugd. Pow. ed. 1856, 85; Alexander *v.* Alexander, 2 Ves. Sen. 640; Tud. Lead. Cas. 319.

[2] 2 Sugd. Pow. ed. 1856, 75; Alexander *v.* Alexander, 2 Ves. Sen. 640; Parry *v.* Bowen, 3 Rep. in Chanc. 6; Tud. Lead. Cas. 317, 320; Hay *v.* Watkins, 3 Dru. & Warr. 339.

[3] Roe *v.* Prideaux, 10 East, 158; 4 Cruise, Dig. 202; Sinclair *v.* Jackson, 8 Cow. 581.

[4] 2 Flint, Real Prop. 548; Tud. Lead. Cas. 317.

revoke the uses of a part of the lands at one time, and a part at another, till he revoked the whole.[1]

9. Several powers are often inserted in the same deed, and two or more of them are to be executed where no provision has been made in regard to their priority. In such a case, the intention of the settlement and the object of the powers must be the guide as to the construction. So the execution of one of two powers may supersede the estate first actually appointed, just as if the estate which supersedes the other had originally been contained in the settlement creating the power. And this must depend upon the nature of the power.[2] And it is the remark of Wilmot, J., in Woolston *v.* Woolston, that "it is the established practice in conveyancing, when it is intended that a power should be executed no further, to release it."[3]

10. But it should be understood, that, where the donee of a power intends to revoke the uses he appoints, he [*330] should expressly *reserve this right in the deed executing the power. If such reservation be not made, the appointment cannot be revoked;[4] and this is especially true where the power has been executed upon receiving a valuable consideration. The extent to which this doctrine may be applied may be illustrated by the following case: Lands were settled on A. L. in 1794, upon her marriage, to the use of such person, for such estate, and as she "by any deed or deeds, with or without powers of revocation to be sealed, &c., or by her last will and testament in writing, or by any writing or writings in the nature of a will, &c., should from time to time, and as often as she should think fit, devise, direct, limit, or appoint." In 1830, she made a deed reciting this indenture, and her intention to exercise her power of appointment, and reserving a power to revoke the appointment, and make any other appointment. In 1833,

[1] Digges' case, 1 Rep. 174; 4 Cruise, Dig. 201; 1 Sugd. Pow. ed. 1856, 342.

[2] 4 Cruise, Dig. 200; 2 Sugd. Pow. ed. 1856, 43, 45; Co. Lit. 271 b, Butler's note, 231; Woolston *v.* Woolston, 1 W. Bl. 281.

[3] Woolston *v.* Woolston, 1 W. Bl. 284.

[4] 2 Sugd. Pow. ed. 1856, 243; Co. Lit. 271 b, Butler's note, 231.

she made a new deed, reciting the indenture and deed of 1830, revoked it, and made a new deed of appointment, reserving the same power of revocation. In 1835, she repeated this in favor of another person; and in 1836 she revoked the last deed, but made no new appointment. In 1848, she made a will, reciting it to have been made in pursuance of the power created in her in 1794, and in execution of it. It was held to be a valid devise, her power of revocation reserved from time to time, and that its final revocation left the power unexhausted, to be executed as it stood originally, and that it might well be executed by will.[1]

SECTION VII.

RULES OF PERPETUITY AFFECTING POWERS.

1. The time within which a power of appointment, &c., must be limited to be executed, and must be executed in order to be a valid power or make a valid execution, is materially affected by the rule of law against perpetuities. This rule, which will be more fully considered under the head of Executory Devises, is based upon the impolicy of allowing estates to be locked up so as to be inalienable for an unreasonable length of time; and the period fixed by the English law is that of the duration of any number of lives in being at the time of making the limitation, and twenty-one years and a fraction of a year besides. This restriction applies to a limitation made through the medium of powers, to the same extent as to one made by any other mode. If, therefore, a limitation made by the deed creating the power would have been void because of its remoteness, it cannot be made by an appointment to such uses under the power thereby created. Thus if an estate were limited to A for life, remainder to his unborn son for life, remainder to the sons of his unborn son, the limitation would be too remote so far as the grandchildren were concerned, and therefore void. And if, instead of that,

[1] Saunders *v.* Evans, 8 H. L. Cas. 721.

the limitation had been to A for life, with power to appoint to his children, and he appoints to a son born after the deed made, with remainder to the sons of such son, the appointment would be void as to such grandchildren, as being too remote. The case here put is that of a special and limited power. But if the power be a general one in the [*331] donee, * whereby he can appoint to whom he please, and such an estate as he pleases, it is regarded as so nearly like a fee in him, that provided the appointment, when he makes it, is not too remote, it matters not though the limitation, as made, would not have been good if made by the deed creating the power. Thus, to carry out the same case as above supposed, except that the donee has a general power, if property is conveyed to A, with power to appoint by deed to such uses as he thinks fit, and he, having no son at the time, waits till he has one before making the appointment, and then he appoints to that son, with remainder to the sons of such son, it will be good. The appointment in the case first supposed relates back to the state of things at the date of the first deed. In the other, it relates to the date of the execution, just as if the donee, being the owner in fee, had then conveyed to a living son, remainder to one unborn, which would be a good limitation.

And in this respect there is an important distinction between the limitations of powers by will and those by deeds. Deeds are construed to take effect from the day of their execution, but wills from the death of the testator. So that, if the limitation first above mentioned — namely, a power to A to appoint to his children — had been by will, and he had no son at the making of the will, but has one during the lifetime of the testator, he may appoint to such son, with remainder to his unborn sons; for a son born before the death of the testator would be considered, so far as a limitation to his children goes, in the same light as one born at the date of a deed.

The point of inquiry, in a case under a special power, is the instrument *creating*, and not the instrument *executing*, the power.[1] The great case of Marlborough *v.* Godolphin may

[1] 1 Sugd. Pow. ed. 1856, 471–475; Lewis, Perpet. 483–485; Burt. Real Prop. §§ 787, 792; 2 Flint, Real Prop. 547; Co. Lit. 271 b, Butler's note, 231; 2 Prest. Abst. 165, 166.

serve to illustrate the application of some of the foregoing rules. That was a devise to A for life, remainder to his first and other sons in tail-male successively; but upon the birth of each of such sons, trustees were to have power to revoke * the uses limited to the sons respectively in tail, [*332] and to limit the premises to such sons for life, with immediate remainders to the sons respectively of such sons in tail-male. It was held to be a void power as to such sons of sons, as tending to perpetuate the estate in the line of the testator's family beyond the period authorized by the law.[1] So where there was a settlement to A for life, remainder to B in fee, with a power to C and his heirs to revoke the uses, it was held a void power, the period being indeterminate within which it might be executed, and might extend beyond the prescribed period of remoteness.[2]

2. It is therefore necessary, in the creation of a power, to assign the period within which it must be exercised. A power, however, though not in terms required to be exercised within the prescribed limits of remoteness, may be good if given to a person living, without being extended to his personal representatives or heirs, since it would constructively be for his life only. It would also be good though it was to be executed by one of his heirs, if it required the assent or direction of a person living in order to its validity. But if it were given to the donee and his heirs, without any thing to limit its execution to a life or lives in being, &c., it would be invalid.[3]

3. Although, as before stated, a power, the direct effect of whose execution is to create a perpetuity, is void, yet a particular power may be good, though delegated in terms general enough to include objects too remote to admit of a valid execution in their favor, provided it be actually executed in favor of one who is within the prescribed limits as to remoteness.

[1] Marlborough *v.* Godolphin, 1 Eden, 404, s. c. 2 Ves. Sen. 61, and reported also under name of Spencer *v.* Marlborough, 5 Brown, P. C. 592; Gee *v.* Audley, cited in Routledge *v.* Dorril, 2 Ves. 368; Gilbert, Uses, Sugd. ed. 160, n.

[2] Ware *v.* Polhill, 11 Ves. 283; Bristow *v.* Warde, 2 Ves. 350, note; 2 Flint, Real Prop. 547; Burt. Real Prop. § 788.

[3] Burt. Real Prop. § 788.

As, for instance, a power to appoint to children, grandchildren, or other issue which is broad enough to include issue in any degree, and which cannot be executed in favor of the issue of an unborn child, if executed in favor of a child, [*333] though unborn, * of a living person, will be good. "The possible exercise of the power in favor of such objects only answers to the chances of abuse which attend the power of dominion possessed by a person absolutely, but which have never been supposed to justify the total deprivation of that power." [1] But if the power had been to appoint to the child of a person unborn at the time of the creation of the power, if by deed, or the death of the testator, if by will, and living at the date of the appointment, and specifically named in it, it would be void, even though the child to whose children the appointment is to be made were to die before the appointment made, *as the limitation must be considered in all respects as if it had formed a part of the original settlement.*[2]

The following case may serve further to illustrate the above propositions, and is complicated and involved, more from the number of considerations requiring attention in its solution than any intrinsic difficulty in apprehending the doctrine intended to be enforced by it. In 1790, by an indenture, a settlement was made, whereby trustees were to pay the dividends of £10,000 to Elizabeth, wife of James, for life, for her separate use. After her death, the dividends of one moiety to James for life; "and after the death of the survivor of them, the trustees were to transfer that moiety unto all or any one or more of the children of E. and J. begotten *or to be begotten*, or unto all or any one or more of such children, and all or any of *the issue* of all or of any of such child or children, at such time or times, in such shares, &c., as E. H. should by deed or will appoint, and in default, &c." Here, it will be perceived, the power given to E. H., to be executed by deed or will, was to appoint to the children of E. and J. begotten, "or to be begotten," or to any *issue* of all or any of such child or children. Regarded, therefore, as a power to appoint

[1] Burt. Real Prop. §§ 792, 793; Lewis, Perpet. 487, 491; 1 Sugd. Pow. ed. 1856, 475.

[2] Lewis, Perpet. 491, 492.

to the issue of unbegotten children, it was clearly too remote and void; and the same would be true *regarded as a power of appointment to a set of persons *collectively*, where some are within the rules as to perpetuity, and others are not, so that, although some of their children might have been then born, the effect would have been the same if the power required the appointment to include the issue of unborn children. Now, in point of fact, E. and J. had, at the time of making the settlement, four sons and two daughters; and the power to E. H. contained therein was, as will be perceived, one of selection as to the objects of appointment; and when E. H. came to execute the power of appointment, which he did by will, he recited the indenture, enumerated the six children of E. J., and "appointed that the shares of the £10,000, which each of the children of E. and J., begotten or to be begotten, as were or should be daughters, would be entitled to in default of appointment, should remain vested in the trustees upon trust as to one moiety thereof, after the decease of E. and J., to pay the dividends to each of the said daughter and daughters as should have attained twenty-one, or be married, for their separate use for life, according to their respective shares of the capital; and that, after their death, the trustees should transfer their shares of the capital unto and equally between and among all their children respectively." So that he in reality appointed a certain share of the fund to the daughters whose names had previously been recited, for life, with a remainder absolutely to their children, irrespective of their having then been born or not. It was contended that this appointment to their children was void for remoteness. But the Vice-Chancellor held, that the power was good in its creation, though some of its objects might have been beyond the limit prescribed by law, as it was a power of selection, and the donee might have selected such of the objects only as were within the prescribed limits. That though, if he had made the appointment collectively among a set of persons, some of whom were within the rule of law as to perpetuity, and some were not, it would have been void *in toto*, instead of having done so in this case, E. H. did not appoint the bulk of the fund, but merely [*334]

directed how the share of *each daughter* should go after her death; and though, if there had been a seventh or an [*335] eighth daughter, the appointment would *have been bad as to their children, nevertheless the appointment as to the share of one of the daughters who was enumerated and named by him would have been good. The partial invalidity of the appointment with regard to the shares of her younger sisters could not have affected the validity of the appointment of her share.[1]

SECTION VIII.

HOW FAR EQUITY AIDS THE EXECUTION OF POWERS.

1. ALTHOUGH the law is thus strict in requiring an exact conformity to the terms of a power when executing it, equity often interposes to correct or supply a defective execution, where there has been a substantial compliance with the terms of the power. But it never interposes where the power has not been executed, and only where the interest created is what was authorized by the power, and where there is merely a defect in the matter of form, and the principal intent of the donor will be accomplished by carrying the execution into effect.[2] If one with a power to lease for twenty-one years exceed that time, the lease would be void at law, but equity might hold it good *pro tanto* for the term of twenty-one years.[3]

2. The mode in which equity thus interposes is by requiring the person who is to hold the estate until the power shall have been executed to give it up in favor of him to whom the appointor intended to appoint, and for whom he took substantial steps to that end.[4]

3. Among the instances where this power has been exer-

[1] Griffith *v.* Pownall, 13 Sim. 393.

[2] Story, Eq. Jur. § 169–175; 2 Sugd. Pow. 88 *et seq.*; Laussat's Fonbl. Eq. 238, 239, and notes; Wms. Real Prop. 248, 249; 4 Cruise, Dig. 222 *et seq.*; Burt. Real Prop. § 1559; Wilkinson *v.* Getty, 13 Iowa, 159.

[3] Sinclair *v.* Jackson, 8 Cowen, 581.

[4] Wms. Real Prop. 248.

cised by courts of equity have been cases where the appointment was in favor of creditors; and the terms by which the power was created required three attesting witnesses, but only two attested its execution.[1] So, where a similar mistake has been made, it *has been exercised in [*336] favor of a *bona fide* purchaser.[2] So where there is a valuable consideration, and by accident the necessary instrument has been imperfectly executed, or the appointment was by will when it should have been by deed.[3] In Virginia, in one case, a sale made by one of several executors was sustained upon the doctrine above stated, the sale having been made under a power to sell for the payment of debts.[4]

4. It may be well to remind the reader again, in connection with what has been said of the execution of powers, that the several estates created by such execution, as they arise, take their places in the settlement in the same manner and order as would have been the case had each been originally limited to the appointee without the intervention of a power. So that, if it would have been invalid in the original settlement, it would be equally so as the offspring of a power created in such settlement.[5]

5. And although an appointment, when executed, is regarded like a use created by the deed which creates the power itself, it nevertheless ordinarily takes its effect from its *execution*, and not its *creation*. The consequence of this rule is often very important in its bearing upon the rights of individuals. In one case a power was given by will to the devisee to appoint by deed or by will to such of her children as she chose, and she appointed by will to two who died in her lifetime. Now, if the appointment could be held to relate back to the time when the will which created the power took effect, the estate would be considered as vesting in the two, and not

[1] Gilbert, Chanc. 301; 2 Sugd. Pow. ed. 1856, 125.

[2] Schenck *v.* Ellenwood, 3 Edw. Ch. 175; Cotter *v.* Layer, 2 P. Wms. 622.

[3] Hunt *v.* Rousmaniere, 2 Mason, 251; Cotter *v.* Layer, 2 P. Wms. 622; Tollet *v.* Tollet, 2 P. Wms. 489; Godwin *v.* Kilsha, Ambl. 684.

[4] Roberts *v.* Stanton, 2 Munf. 129, Roane, J., dissenting; *contra*, M'Rea *v.* Farrow, 4 Hen. & M. 444.

[5] Wms. Real Prop. 256; Co. Lit. 271 b, Butler's note, 231; Commonwealth *v.* Williams, 13 Penn. St. 29; Roach *v.* Wadham, 6 East, 289.

defeated by their death. But if it could only take effect when the will of the appointor took effect, that is, upon her death, the appointment must fail, having lapsed by the death of the appointees in the lifetime of the appointor. And it [*337] was held, that the appointment related *to the time when it was effectually made, and therefore that the appointment in this case failed.[1]

6. Although it has been remarked, that powers are more frequently made use of in arranging family settlements than for any other purpose, it is not proposed to pursue this subject into its detail; and it is simply necessary to add, that the powers most usually found in modern deeds of settlement are those of raising a jointure in favor of a wife out of lands held by a tenant for life only, to lease lands by the donee of the power beyond the period of his own estate, and powers of sale and exchange of the lands settled in such deeds of settlement.[2]

[1] Marlborough *v.* Godolphin, 2 Ves. 61; Co. Lit. 271 b, Butler's note, 231, § 3, pl. 4.

[2] Cruise, Dig. Deed, c. 14–16, where the subjects are fully treated of. The reader is also referred to the Appendix for a form of a modern deed of settlement.

CHAPTER VII.

EXECUTORY DEVISES.

SECT. 1. Nature and Classification of such Devises.
SECT. 2. How Rules as to Perpetuities affect Executory Devises.
SECT. 3. Limitations upon Failure, &c., when Remainders or otherwise.
SECT. 4. Interests of Executory Devisees.
SECT. 5. Executory Devises of Chattel Interests.
SECT. 6. Power of Devisee over a Term.
SECT. 7. Devises for Accumulation.
SECT. 8. Statute Rules against Perpetuities.

SECTION I.

NATURE AND CLASSIFICATION OF SUCH DEVISES.

1. Executory devises defined.
2. They are interests, though not estates, in land.
3. Of the analogy between executory devises, &c., and remainders.
4–6. Of the origin and introduction of such devises.
7. Of the classes into which they are divided.
8. First, where one fee is limited after another fee.
9. Second, where a freehold is limited *in futuro*.
10. How devisor's interest is affected in the first and second classes.
10 *a*. Mr. Smith's seventh class of executory limitations.
11. Mr. Preston's sixth class explained and applied.
12. Future estates, as construed by remainders, rather than executory devises.
13. Principle does not apply to the second class of devises.
14. Rules to distinguish between executory devises and remainders.
14 *a*. Limitations, both remainders and executory devises.
15. When a limitation over upon dying without issue is a remainder.
16. When a contingent remainder may be changed into an executory devise.
17. When an executory devise may change to a contingent remainder.
18. How far a limitation may be certain, after one that is uncertain.
19. Effect on a subsequent limitation of a preceding one not a condition.
20. Effect upon subsequent limitations of a prior one carrying the whole interest.

21. Case of Lion *v.* Bertiss, 20 Johns. 483.
22. Law as to "dying without issue," &c., being a general failure of issue.
22 *a*. Same subject illustrated.
23. Distinguishing characteristics of devises and remainders.
24. Of the respective destructibility of the two.
25. Limitation by devise after a previous estate which fails.
26. Executory devises, not alienable, tend to perpetuities.

1. THERE is a class of interests well known to the law which partake so much of the character of the executory interests created by deeds under the statute of uses, as well as of remainders, that it seems proper to treat of them next in order in the arrangement of the topics of this treatise, and these are what are called Executory Devises. It is not proposed to speak at present of wills and testaments, by which alone they may be created, but of the nature, character, and incidents of the interest in lands embraced under the generic term above mentioned. An executory devise is defined by Blackstone to be "such a disposition of lands by will that thereby no estate vests at the death of the devisor, but only on some future contingency." While Mr. Fearne, objecting that this was broad enough to embrace contingent remainders created by wills, which the law distinguishes from executory devises in many respects, defines an executory devise, so far [*341] as it embraces *lands, as "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."[1]

2. Before the nature of an executory devise was settled, there was a long struggle in the courts, which is referred to in Jones *v.* Roe, where it was finally held that it was a something which might be assigned or released, and would descend, and might be devised; that, though not in all cases properly an estate, it was not embraced in the category of naked possibilities, such as that of an heir expectant to the estate of his ancestor, but was an interest in land. The language of Willes, Ch. J., is quoted with approbation, who says: "Ex-

[1] 2 Bl. Com. 172; Fearne, Cont. Rem. 386, and Butler's note; 1 Jarm. Wills, 798; Lewis, Perpet. 74; Purefoy *v.* Rogers, 2 Wms. Saund. 388, note; McRee's Adm'rs *v.* Means, 34 Ala. 349. In the Alabama Code, remainder includes executory devises.

ecutory devises are not naked possibilities, but are in the nature of contingent remainders;" and another judge refers to them as "a possibility accompanied with an interest."[1] But the power of alienation, devise, &c., above spoken of, must be understood to be limited to cases where the party who is to take is an ascertained person.[2]

3. Much of the learning of executory devises consists in applying rules which discriminate between them and contingent remainders, while most of the doctrine relating to springing and shifting uses is identical with that of executory devises, with this distinction, that by an executory devise the freehold itself is transferred to the future devisee substantively, without any reference to the statute of uses.[3]

4. It is stated in the above case of Jones *v.* Roe,[4] that executory devises took their rise in the time of Elizabeth. But to understand their history fully, it is necessary again to refer to the doctrine of uses, whereby, before the statute of Henry VIII. upon the subject, the owners of lands, though not able to devise them by the common law, could do so by conveying the land to a feoffee to such uses as the feoffor should appoint by his *last will. The will operated upon [*342] the use, and was enforced then through the agency of chancery.[5]

5. Besides this mode, there were localities where people were allowed by custom to devise their lands, and courts readily lent their aid to carry such devises into effect. The earliest instance, it is supposed, in which it was allowed to a testator to create an executory interest by will, was where he directed his executor to sell his lands, and the courts sustained it as the execution of a power which divested the heir of his estate, and passed it to a purchaser. Littleton spoke of it as a custom to do this, "to distribute for his soul."[6] The statute 21 Hen. VIII. c. 4, recognized this as a valid power, giving authority to such executors as accept the trust to execute it, though some of them declined it.

[1] Jones *v.* Roe, 3 T. R. 88–98; Wilson, Uses, 157.
[2] Wilson, Uses, 159. See *post*, p. *357.
[3] 1 Spence, Eq. Jur. 471; Lewis, Perpet. 72; Wms. Real Prop. 259.
[4] Jones *v.* Roe, 3 T. R. 95.
[5] Wms. Real Prop. 257.
[6] Lit. § 169; Wms. Real Prop. 258; Lewis, Perpet. 76.

6. The statute of uses, 27 Hen. VIII. c. 10, put an end to all devises of lands till the enactment of the statute of wills, 32 Hen. VIII. c. 1, A. D. 1542, authorized the holders of socage lands to devise them by a last will and testament. In construing this statute, courts adopted the more liberal rules which chancery had before applied to the former devises, expounding them by the intention of the testators if possible, rather on the particular circumstances of each will, than by any general rules of positive law.[1] And acting in analogy to what had been adopted as the rule of chancery in respect to devises of uses, as well as the rules which courts of law had applied in case of customary devises, the courts sanctioned the validity of devises of future estates of freehold, as well as sales made by executors when authorized by the wills under which they acted, or where lands were devised to executors to be sold, although at common law such executory devises would have been void.[2] Regarding them historically, it would seem that they must have been of gradual introduction and growth as a settled and defined portion of the English law; for though it was stated by Lord Ken-
[*343] yon, in * Jones *v.* Roe,[3] that they took their rise in the time of Elizabeth, it was said by the same judge, in Doe *v.* Morgan,[4] that, being found of general utility, they were established in the time of Charles I. And in the argument of Thellusson's case (1798), Mr. Hargrave states that "executory devise was not regularly admitted till about two centuries ago." But Mr. Lewis refers to cases in which the doctrine was recognized at a period anterior to that. Still, the law upon the subject, especially the indestructibility of executory devises, does not seem to have been settled until the case of Pells *v.* Brown,[5] in 1619, though courts had often recognized as valid devises of estates of freehold to commence *in futuro*.[6] Nor was the law in relation to them fully

[1] 1 Spence, Eq. Jur. 470; 2 Bl. Com. 382.

[2] Lewis, Perpet. 78, 79; Wms. Real Prop. 259; 1 Spence, Eq. Jur. 470; Wilson, Uses, 56.

[3] Jones *v.* Roe, 3 T. R. 95.

[4] Doe *v.* Morgan, 3 T. R. 765.

[5] Pells *v.* Brown, Cro. Jac. 590.

[6] Fearne, Cont. Rem. 429, note; Lewis, Perpet. 80–82, 131; Thellusson *v.* Woodford, 1 Bos. & P. N. R. 357.

settled till the Duke of Norfolk's case in 1695.[1] And finally, Lord Mansfield, in 1785, declared that he remembered the introduction of the rule which prescribes the time in which executory devises must take effect to be for the period of a life or lives in being, and twenty-one years afterwards.[2]

7. Mr. Fearne divides executory devises of freeholds into two classes, making devises of chattel interests a separate class or division. This he borrowed from the language of Powell, J., in Scatterwood *v.* Edge ; and in this he has been followed by Mr. Cruise, and by Shaw, Ch. J., in Nightingale *v.* Burrell, and will be followed in the present treatise, although Mr. Preston divides the two classes into six, and the third into two or three more.[3]

8. The first of these embraces cases where a fee-simple, for instance, is devised to one, but is to determine upon some future event, and the estate thereupon to go over to another. An *instance illustrative of this principle [*344] would be a devise to a mother for life, and after her death to the testator's brother in fee, provided that if the testator's wife, then *enceinte*, was delivered of a son, then the land should remain in fee to him. A son having been born, took the estate as an executory devise. So a devise to A and his heirs, but in case he die within age, then to go to B and his heirs, B's interest is an executory devise.[4] But where the devise was to A and B and their heirs, but, if either died without issue, his share was to go to the survivor, and one of them had issue and died, it had the effect to defeat the executory devise, and to change both estates into fees-simple ; the contingency of either dying without issue while there was a survivor had thereby become impossible.[5] So in a devise to

[1] Wms. Real Prop. 262, and note.

[2] Buckworth *v.* Thirkell, 3 B. & P. 652, n.; Cadell *v.* Palmer, 10 Bing. 140 ; s. c. 1 Clark & F. 372.

[3] Fearne, Cont. Rem. 399; Scatterwood *v.* Edge, 1 Salk. 229 ; 6 Cruise, Dig. 366; 4 Kent, Com. 268, and note ; Nightingale *v.* Burrell, 15 Pick. 104; 2 Bl. Com. 172; 2 Prest. Abst. 124.

[4] Nightingale *v.* Burrell, 15 Pick. 104, 111 ; Marks *v.* Marks, 10 Mod. 423; Doe *v.* Fonnereau, Doug. 487; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 151 ; Purefoy *v.* Rogers, 2 Wms. Saund. 388 a, note.

[5] Brightman *v.* Brightman, 100 Mass. 238.

A, but if she died without a child, then to B, it was held that A took a life-estate, which might become a fee upon her leaving a child, and that a fee over was limited to B, if she left no child.[1] In neither of these cases could the second estate have taken effect as a remainder, for a reason which furnishes a discriminating test whether a limitation is an executory devise or not; namely, that the prior estate in each was a fee-simple, after which, as before explained, no remainder can be limited. And then, again, if the second took effect at all, instead of waiting till the prior estate had naturally expired, it came in and superseded it, cutting it short before its regular determination, which a remainder never does.[2] So where the devise was to six children in fee, with limitations over to the survivors which would have given them cross-remainders if the first devise had been to them for life only, as it was in fee, these limitations could only take effect as executory devises, and as such were held to be good.[3] The estate limited after the first limitation in fee-simple may be a fee or a less estate.[4] In one case, the devise was to a daughter in fee; but if she died without lawful issue, then to the testator's other surviving children, or their representatives. All the testator's children died in the lifetime of the wife, so that she died without issue, and one only of these children left issue. It was held, that the issue of this child took the estate as executory devisees.[5]

9. The second class of executory devises includes those cases where the testator limits a future estate of freehold to come into existence at a period certain, or upon a contingency, but does not part with the fee. As, for instance, where a devise is made to A and his heirs, to take effect at the end of six months from the death of the testator.[6] So where the testator devised an estate to such of his nephews as should

1 Hatfield *v.* Sneden, 42 Barb. 615, s. c. 54 N. Y. 285, 286; Johnson *v.* Simcock, 7 H. & Norm. 344.

2 Nightingale *v.* Burrell, 15 Pick. 104, 110.

3 Jackson *v.* Blanshan, 3 Johns. 299; Hilliary *v.* Hilliary's Lessee, 26 Md. 274.

4 2 Bl. Com. 173; Watk. Conv. ed. 1838, 193.

5 Jackson *v.* Kip, 2 Paine, C. C. 366.

6 6 Cruise Dig. 377; Fearne, Cont. Rem. 400.

first come to this country within six years after the testator's death, it was held that in the mean time the estate descended to the testator's * heirs-at-law.[1] * Such [*345] limitations would be clearly void at common law, as being independent freeholds to commence *in futuro*. Of the same nature is a devise to the heirs of A B who is then living, or to a *feme sole* and her heirs upon her marriage.[2] Nor could they be sustained at common law as remainders, for the obvious reason that they were contingent limitations without any particular estate to sustain them.[3]

10. A distinction, already referred to, exists between the two classes of executory devises above mentioned, and it is this: In the first, the whole estate goes, in the first place, out of the devisor; in the other, nothing goes out of him until the event happens which is to give effect to the devise. In the mean time, the estate goes to the heirs of the testator, unless it should pass as a particular or residuary devise.[4] It may be stated, that, as devises take effect at and from the death of the testator, if a devise be in terms a present one, and nobody is *in esse* capable to take under it at the testator's death, it will be void; it cannot be construed an executory devise so as to take effect when some one answering to the description comes *in esse*. Thus, if a devise is to the heirs of J. S., and J. S. is living at the testator's death, there is no one *in esse* answering to the devisee, and the devise fails. But if it had been in terms deferred to the death of J. S. as to the heir of J. S. after his death, it would have been a good executory devise to take effect at the happening of a future event.[5] Thus a devise to a society which is now in exist-

* NOTE. — The reader will remark that much of what is said of this class of executory devises must be inapplicable in those States where, by statute, freeholds may be created to commence *in futuro*, and the common law in this respect is changed.

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[1] Chambers *v.* Wilson, 2 Watts, 495.

[2] 2 Bl. Com. 173; Leslie *v.* Marshall, 31 Barb. 566. [3] 2 Bl. Com. 173.

[4] 4 Kent, Com. 268; Watk. Conv. ed. 1838, 199; 2 Prest. Abst. 120; 6 Cruise, Dig. 423. It is proposed to treat of the third class of these devises by themselves, later in the work.

[5] 6 Cruise, Dig. 422; Goodright *v.* Cornish, 1 Salk. 226.

ence, but not capable of taking, would be void; nor would it become valid by their subsequently acquiring a capacity to hold property. But a devise to such a society, when it shall become capable of taking, would be good as an executory devise when the society shall have acquired such capacity. And it is stated as a broad and general principle, that every executory devise is upon some condition or contingency, and takes effect upon the happening of such contingency or performance of such condition.[1] So a devise to the unborn children of a person, though *in præsenti*, is good, for the intention of the devise is clearly future in its construction.[2]

10 *a*. Mr. Smith, in his notes upon Mr. Fearne's Remainders, and Executory Devises, has given, as a *seventh* limitation of executory interests, the case where the first limitation creates an interest to take effect on the regular expiration of a qualified fee, which must expire, if at all, within the period prescribed by the rule against perpetuities, as where land is limited to A and his heirs, by way of use or devise, *till* B shall, &c., and then to B and his heirs.[3]

[*346] *11. While it has not been thought advisable to adopt for this work Mr. Preston's division of executory devises, it seems proper to notice what he calls his sixth class, partly as an example of the artificiality of his classification, and partly as presenting a question of some nicety. He defines his sixth species of executory devises to be "where there is a devise of an estate of inheritance, or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same."[4] Mr. Powell, in his work on Devises, favors this idea of a partial displacement of the first estate.[5] But Mr. Fearne contends against it, on the ground, that, if the second estate takes effect at all, the first is displaced altogether.[6] The following case, involving this question, is understood to have

[1] Ingliss *v.* Trustees, &c., 3 Peters, 99, 114, 115; Porter's case, 1 Rep. 24; Leslie *v.* Marshall, 31 Barb. 565.

[2] 6 Cruise, Dig. 423; Doe *v.* Carleton, 1 Wils. 225.

[3] 2 Fearne, Cont. Rem. Smith's ed. 41.

[4] 2 Prest. Abst. 140.

[5] 2 Pow. Dev. 241.

[6] Fearne, Cont. Rem. 251, 530.

arisen in the Supreme Court of Delaware, and the court were divided in opinion upon it; namely: A devise was made to a son and his heirs; but if he died without leaving children, then to A B for life. The son died without children. A B entered and enjoyed the estate during his life; and then the question arose, whether the heirs of the devisor or of the son became entitled to the estate. Upon the theory of Mr. Fearne, the estate of the son was wholly defeated. Upon that of Mr. Preston, the life-estate of A B was carved out of the fee in the son, and all that was left of the estate still remained in his heirs. The remarks of Mr. Powell upon the subject are: "To this important rule, namely, that an estate subject to an executory devise to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it, for the books do not furnish a single example of its application." [1] It may be travelling out of the record to attempt to settle a question upon which such writers differ, or are in doubt. Yet if devises are * to be construed accord- [*347] ing to the intention of the devisors expressed in their wills, and a case occurs where, in terms, the devisor gives away his entire inheritance to an object of his bounty, thereby substituting him in his own place, except that, if a certain event happens, a third person is to share in the inheritance for a limited period, and nothing is said as to what shall then become of the balance of the inheritance, it would strike a common mind that this residue must belong and go to the first-named devisee, and that the particular estate given to the second devisee named should be considered as carved out of the estate of the first, rather than that the first should be regarded as defeated, and the second take effect out of the reversionary interest of the devisor to whom the estate would finally revert.

12. There are various reasons for the anxiety always manifested by the courts to construe future limitations as remainders, if possible, instead of executory devises. In the first

[1] 2 Pow. Dev. 241.

place, remainders were a well-defined class of interests, and the rules in regard to them well understood before executory devises were fully recognized; and the latter are, moreover, contrary to the rules and spirit of the common law in respect to the conveyance of estates. In the second place, executory devises are, in their nature, indestructible, and the lands thereby limited may be in that way locked up from alienation.[1] The rule, therefore, which is laid down in Purefoy *v.* Rogers, is recognized by all the authorities as a governing principle; namely, that "where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise."[2]

13. These remarks must, of course, be limited to the first class of executory devises, for the very definition of [*348] the second * class precludes the idea of a prior estate upon which the executory devise depends. In respect to the former, there are certain rules by which to distinguish them from remainders, which it may be well to state.

14. In the first place, if the prior estate is a fee-simple, the second must be an executory devise, for the reason that a remainder cannot be limited upon a fee-simple.[3] When, therefore, the limitation is after a fee-simple, it will not make it any the less an executory devise, that the prior estate in fee is contingent and not vested, if the ulterior devise is so limited as to take effect in defeasance of the prior estate after that has vested. This general proposition is illustrated in the case of Gulliver *v.* Wickett,[4] where the devise was to the wife for life, and after her death to the child with which she was supposed to be *enceinte*, and to the heirs of such child for ever; but if such child should die under twenty-one years of

[1] Purefoy *v.* Rogers, 2 Wms. Saund. 388; Watk. Conv. 192, Coventry's note: Nightingale *v.* Burrell, 15 Pick. 104, 110; Doe *v.* Morgan, 3 T. R. 763; Hall *v.* Priest, 6 Gray, 18, 20; Parker *v.* Parker, 5 Met. 134, 138; Watk. Conv. 202; Doe *v.* Fonnereau, Doug. 487; Doe *v.* Considine, 6 Wall. 475.

[2] Nightingale *v.* Burrell, 15 Pick. 104, 111; Doe *v.* Morgan, 3 T. R. 763; Wilson, Uses, 5; Terry *v.* Briggs, 12 Met. 17, 22; Manderson *v.* Lukens, 23 Penn. St. 31.

[3] Nightingale *v.* Burrell, 15 Pick. 104, 111. [4] Gulliver *v.* Wickett, 1 Wils. 105.

age, leaving no issue of its body, the reversion to go over. It was held, that, although the estate to the child was a contingent fee, this limitation over was an executory devise, since it was so limited, that, if the child were born, he would at once have a vested remainder in fee; but if he died without heirs of his body, under twenty-one years of age, the devise over at once came in and took effect in defeasance of such estate in fee. Nor would it make any difference that no child was born. The devise over would still take effect, and as an executory devise, and not as a remainder, from the circumstance, that by its original limitation it was not to take effect as an alternative limitation in case simply of no child being born, but it contemplated the child's being born, the fee vesting in him, and his subsequently dying without issue, when, and when only, according to its terms, the limitation over was to take effect: merely because she had no child, could not, therefore, change the character of the devise to the second devisee, for wills must be construed * upon [*349] the circumstances as they stood at the testator's death, and not be varied by subsequent events.[1] *

14 *a*. While the proposition is a general one, that an estate may be devised over in either one of two events, and that in

* Note. — Mr. Wilson, in his treatise on Uses, p. 19, contends, that under the decision in Doe *v.* Burnsall, 6 T. R. 30, and Crump *v.* Norwood, 7 Taunt. 362, the limitation in Gulliver *v.* Wickett, called Roe *v.* Wickett, in Willes, Rep., would now be held to be a contingent remainder, rather than an executory devise. In Doe *v.* Selby, 2 B. & C. 930, Bayley, J., assumes that "Gulliver *v.* Wickett was clearly a case of executory devise;" while in Evers *v.* Challis, 7 H. L. Cas. 550, Lord Cranworth expressed an opinion that it was a case of contingent remainder, and not of executory devise. But by a reference to those cases it will be found that the contingency upon which the future estate depended was the dying of the one who had the preceding life-estate without issue, *or* the dying of such issue under the age of twenty-one, making the devise over depend upon a double contingency, or one with a double aspect. Whereas, in Gulliver *v.* Wickett, there was but a single contingency provided for in the will, namely, the dying of the child within twenty-one years; the fact that the wife was *enceinte* being assumed as a fact, and the future estate not being made to depend on that event. See Meadows *v.* Parry, 1 Ves. & B. 124; Fonnereau *v.* Fonnereau, 3 Atk. 315; Statham *v.* Bell, Cowp. 40; Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245; Tud. Lead. Cas. 705-711.

[1] Fearne, Cont. Rem. 396, 397; Roe *v.* Wickett, Willes, 303; Doe *v.* Fonnereau, Doug. 481.

one event the devise over may operate as a contingent remainder, and in the other as an executory devise, it is not easy always to discriminate where this doctrine is to apply. One test given in Doe *v.* Selby is, that if the first limitation be of a vested fee, though determinable, the subsequent limitation or remainder is an executory devise, because it is limited after a fee. But if the first be a limitation of a fee upon a contingency, and, upon the failure of the estate so limited, there be a devise over, and the contingency do not happen, the remainder would be a contingent remainder, and not an executory devise. Thus a devise to G. for life, remainder to his children and their heirs, or if G. died without children, or, leaving issue, such issue died before twenty-one years of age, then a devise over to T. A. and D. and their heirs, it was held to be the limitation of a contingent remainder to those devisees, because G. never was married. Had he married and had a child, the limitation over would have been an executory devise.[1]

15. It is hardly necessary to say, that an estate of freehold limited after an estate-tail would be a remainder.[2] But it often is a matter of nice construction, whether a limitation after an estate to one which is to fail if he die without heirs of his body living at his death is an executory devise or a remainder. If, for instance, the devise is to A and his heirs, and if he dies without issue living, then over, it is by implication an estate-tail, the word "issue" making "heirs" to mean heirs of his body, and showing the testator's intention that the estate shall go in a succession to such heirs.[3] A case of this kind was a devise to two children, and, if either died before arriving at twenty-one years, the survivor was to have the whole; and if both died without leaving any heirs of their bodies begotten, then there was a devise over. It was held that they took estates-tail with cross-remainders, with a remainder over upon both dying without issue.[4] But if there is not implied an intent that the issue shall take as children and heirs of the parent, but merely that the dying

[1] Doe *v.* Selby, 2 B. & C. 926, 930.
[2] Hall *v.* Priest, 6 Gray, 17, 20.
[3] Hall *v.* Priest, 6 Gray, 17, 21; Parker *v.* Parker, 5 Met. 134, 139.
[4] Allen *v.* Trustees, &c., 102 Mass. 263; Matlock *v.* Roberts, 54 Penn. St. 148.

without issue is to be an event upon which the testator intended that the estate should cease to be one of inheritance in the family of the first taker, and should go over to a third person, the limitation becomes, as to such third person, an executory devise, and not a remainder. "The event of a person's dying without leaving * issue surviving [*350] or not is a contingency upon which an executory devise may be limited over, as well as the happening of any other event." [1]

16. A limitation by way of contingent remainder may, by a change of circumstances before the will in which it is contained takes effect by the testator's death, be changed into an executory devise rather than that the intention of the devisor in respect to the devise should be defeated. But a limitation once operating as a contingent remainder can never, after the death of the testator, be changed into an executory devise. Thus where a limitation is made to A for life, remainder in tail to the sons of B, who has no sons, and A dies in the life of the testator, if the sons of B shall not then have been born, the limitation to them becomes an executory devise, just as if no previous limitation to A had been made. But had A survived the testator, whereby his estate for life would have vested, and then had died before a son was born to B, as the limitation to such son could take effect as a contingent remainder, it could not be sustained as an executory devise.[2] The case of Hopkins *v.* Hopkins [3] was briefly this: A devise was made to S. H. for life, and after his death to his sons; and, if he died without issue, over to the sons of J. H., who were then unborn. This was, of course, in terms, a contingent remainder in the sons of J. H., expectant upon their being born, and the dying of S. H. without issue. S. H. died in the life of the testator without issue, and the testator died before the birth of any son of J. H., who afterwards had a son. It was held, that this son took an executory devise in

[1] Nightingale *v.* Burrell, 15 Pick. 104, 112, 113; Purefoy *v.* Rogers, 2 Wms. Saund. 388 b.

[2] Fearne, Cont. Rem. 525, 626, and Butler's note; 2 Prest. Abst. 172; Purefoy *v.* Rogers, 2 Wms. Saund. 388 g; Hopkins *v.* Hopkins, Cas. temp. Talb. 44; 6 Cruise, Dig. 422; Doe *v.* Howell, 10 B. & C. 191.

[3] Hopkins *v.* Hopkins, Cas. temp. Talb. 44.

the same manner as if the limitation to S. H. and his sons had not been contained in the will.

17. A limitation taking effect as an executory devise may, by a change of circumstances, become a contingent [*351] remainder, * though it can never afterwards, if it fail as a remainder, enure as a conditional limitation or springing use. The illustration given by Mr. Preston is a limitation to A, from and after Michaelmas, for life, remainder to his first and other sons in tail. Till Michaelmas, the gift operates as an executory devise. After Michaelmas, if the estate of A vests, the interest of his son will be a remainder.[1] The rule, as stated by Mr. Williams, is, "Wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. However, it seems to be established, that, whenever the first limitation vests in possession, those that follow vest in interest at the same time, and cease to be executory, and become mere vested remainders, and subject to all the incidents of remainders."[2] The doctrine upon the subject is stated thus by Mr. Butler, in his edition of Fearne on Contingent Remainders:[3] "An executory devise may confer either an estate in fee-simple or a less estate. On every estate conferred by an executory devise, another executory devise may be limited; and if the estate conferred by an executory devise be an estate in tail, for life or for years, it may be followed by a remainder; but while the executory estate after which the remainder is to arise is in suspense, it is not properly a remainder, but a right which is to be converted into a remainder on a particular event. Thus, if land is devised to A and his heirs, and, if A should not have issue living at his decease, to B for life, and after B's decease to C in fee, the limitation to C would immediately vest in C a fixed right to a remainder in fee, if A should die without issue in B's lifetime, and to an estate in fee-simple in possession if A should survive B and afterwards

[1] 2 Prest. Abst. 173; Wilson, Uses, 149.

[2] Purefoy *v.* Rogers, 2 Wms. Saund. 388 h, note. Mr. Williams cites Hopkins *v.* Hopkins, Cas. temp. Talb. 44, and Stephens *v.* Stephens, Id. 228. And the same rule applies to springing and shifting uses. Wilson, Uses, 143.

[3] Fearne, Cont. Rem. 503, Butler's note.

die without leaving issue. But, during A's life, C would only have an executory fee."

18. So a preceding limitation, whether by will or by deed, to uses, may be uncertain and contingent, while a subsequent one, though to take effect *in futuro*, may not be uncertain or conditional, *otherwise than that it may [*352] possibly expire before the former vests or fails, but may be so limited as to take effect either in default of the preceding limitation taking effect at all, or, if that should take effect, by way of remainder after it. In either of those cases, this subsequent estate must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail of taking effect, the subsequent one will then vest in possession; and should the preceding one take effect, the subsequent one will, at the same instant, vest in interest as a remainder upon the preceding one.[1] This proposition, transcribed for the purpose of illustrating more fully how limitations of future interest and estates may change from what is in form a remainder into an executory devise, as well as the converse of this proposition, is itself illustrated by the following case: A devise was made to two trustees and their heirs till B should attain twenty-one years or have issue; and if B should attain to twenty-one, or have issue, then to B and the heirs of his body. But if he died before twenty-one, and without issue, then remainder over to C. Now, here, as the limitation to the trustees was a fee, that to B was an executory devise, as was also the limitation over to C, on B's dying under age and without issue. But supposing the limitation were to C for life, and he were to die before B was twenty-one or had issue, his estate would expire altogether. To that extent it would be conditional. But as the limitation to B, if it ever takes effect, is of an estate-tail only, the limitation over may be a vested one in interest, as it is to take effect either upon the death and failure of issue within the twenty-one years of B's life, or after B's estate-tail, if that should vest in him; and it must, moreover, in the latter event, take effect as a remainder after the determination of B's estate. The

[1] Fearne, Cont. Rem. 506.

consequence would be, that either it would vest as a remainder upon B's executory devise taking effect as an estate in possession; or, if B died under twenty-one and without issue, it would take effect as an estate in possession, the executory devise in the one case being changed into a [*353] *remainder, in the other into an estate in possession.[1] Another case of this kind was where a devise was made to J. S. for five years from and after the next Michaelmas, remainder to C and his heirs. Here C's interest could not be a remainder for want of a particular estate to sustain it, as J. S. had no estate until Michaelmas after the testator's death. It was consequently an executory devise. If J. S. died before Michaelmas, C would take the fee as an executory devise. If J. S. survived that point of time, C's interest was at once changed thereby into a vested remainder.[2]

19. Another proposition may here be stated, not because it illustrates how the nature of limitations may shift from an executory devise to a remainder or the reverse, as circumstances may determine, but because the principle on which it rests has already been anticipated in discussing those points. Thus, where a devise or limitation by deed to uses is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate should never arise or take effect, the remainder over will nevertheless take place, the preceding estate being regarded as a prior limitation merely, and not as a preceding condition requisite and necessary to give effect to the subsequent limitation.[3] Thus, in the case of Brownsword *v.* Edwards, cited above, the limitation to C was, after the executory or contingent limitation to B, to take effect, in terms, on condition that B died before twenty-one without issue; yet if B had died before twenty-one without issue, and thereby no estate had ever taken effect in him, the limitation to C would, nevertheless, take effect as soon as the previous limitation to B had ceased by his death.

[1] Brownsword *v.* Edwards, 2 Ves. Sen. 247; Wilson, Uses, 143, 144; 6 Cruise, Dig. 412.

[2] Pay's case, Cro. Eliz. 878.

[3] Fearne, Cont. Rem. 508; Wilson, Uses, 144; 6 Cruise, Dig. 413.

20. One other proposition of a somewhat more general character should be made in this connection. Whatever may be the number of limitations after the first executory devise, or limitation * by deed, by way of springing [*354] or shifting uses, of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good, in the event that no one of the preceding executory limitations which would carry the whole interest happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take effect, that instant all the subsequent limitations become void, and the whole interest then becomes vested.[1]

21. The case of Lion *v.* Burtiss will serve to illustrate and show the application of some of the foregoing rules. The devise in that case was to two brothers, Joseph and Medcef, of two separate parcels, with a proviso, that, if either died without lawful issue, his share should go to the survivor; and in case of the death of both, without lawful issue, that all the estates should go to John, &c. Joseph died without issue; and it was held, that as Joseph's share was to go, upon his dying without issue, to the survivor, the term must have intended a definite failure of issue at his death, and not an indefinite or general failure at some future period; and, consequently, the devises to Joseph and Medcef were each of a fee, and the devise over in the alternative was an executory devise; consequently Medcef took Joseph's share as an executory devise, and the devise over to John was, when made, of the same character. But inasmuch as the term "survivor" applied only to the two first takers, the failure of issue, as applied to the issue of the survivor, took the ordinary meaning of that expression, and implied that the survivor took an estate-tail determinable upon a failure of his issue, so that the limitation to John became at once, on Joseph's death, a remainder expectant upon an estate-tail in Medcef.[2]

[1] Fearne, Cont. Rem. 517, Butler's note, 513; Wilson, Uses, 147.

[2] Lion *v.* Burtiss, 20 Johns. 483; and see Anderson *v.* Jackson, 16 Johns. 382, on which it was founded, commented upon at length by Chancellor Kent, 4 Kent, Com. 279, where the Virginia case of Bells *v.* Gillespie, 5 Rand. 273, is consid-

22. It may be remarked that by the rule of the [*355] common law, * though generally regulated now by statute, where a devise is to one and his heirs, with a devise over upon his "dying without heirs," or "heirs of his body," or "dying without having issue," or "without issue," and with no explanatory words defining the time to which this contingency is to apply, it is construed to be a general failure of issue at any time, however indefinite or remote, and which may not, therefore, happen for many generations. The intention of the devisor in such case is, therefore, held to be, that the estate shall not go over until such issue fail or become extinct, be it at ever so remote a period.[1] And this often serves as a clew by which to determine whether a limitation in a devise is a remainder or an executory devise. If, as explained above in the case of Nightingale *v.* Burrell, the limitation be to the first-named devisee and his heirs, and then a limitation over in case he dies without issue, the question is, whether a dying without leaving issue living at the time of his death is meant, or a general failure of issue. If the former, then the limitation over is upon a fee, and is of course an executory devise, to take effect upon the happening of a certain event which must occur, if at all, at the first devisee's death. If the latter was intended, then it restricts the meaning of *heirs* to such as are heirs of the devisee's body, and his estate to an estate-tail which is capable of sustaining a remainder; and, consequently, the devise over to the second devisee is a remainder.[2]

ered. In that case, the majority of the court held the limitation over to the survivor an estate-tail, and not an executory devise. For the various forms in which the devise, on which Lion *v.* Burtiss arose, came up for consideration by the courts, see Edwards *v.* Varick, 5 Denio, 664; Varick *v.* Edwards, 11 Paige, Ch. 290; Pelletreau *v.* Jackson, 11 Wend. 110; Jackson *v.* Waldron, 13 Wend. 178.

[1] Burt. Real Prop. § 665; Watk. Conv. 200, Coventry's note; Hawley *v.* Northampton, 8 Mass. 3, 41; Ide *v.* Ide, 5 Mass. 500, 502, 503; Parker *v.* Parker, 5 Met. 134, 139; Hall *v.* Priest, 6 Gray, 18, 20; Nightingale *v.* Burrell, 15 Pick. 104, 112; Kay *v.* Scates, 37 Penn. St. 39. In Mississippi, "without issue," &c., is held by statute to mean a *definite* failure of issue unless expressly declared otherwise. Hutchinson's Dig. p. 110.

[2] Purefoy *v.* Rogers, 2 Wms. Saund. 388 b; Burt. Real Prop. §§ 652, 664; Hall *v.* Priest, 6 Gray, 17, 18; Parker *v.* Parker, 5 Met. 134; Doe *v.* Considine, 6 Wall. 475; Sears *v.* Russell, 8 Gray, 92.

22 *a*. This distinction between an estate after "the failure of issue," being a remainder or an executory devise, is illustrated in the following cases: Testator gave an estate to B and his heirs and assigns; but in case he happened to die intestate and without issue, then to C. It was held, that, inasmuch as B had a full power of disposal of the estate, what he had given him was not a fee-tail subject to pass as a remainder upon an indefinite failure of issue, but was an executory devise of a fee, and the devise over was void.[1] A devise was to a wife and daughter, and to the survivor. If the daughter died leaving issue, they were to take the estate by descent; and if she died before the wife, her issue were to enjoy the estate from the time of her death; but if the daughter left no issue, the executor of the devisor was to sell the estate in fee, and divide the money in a manner prescribed. After the wife's death, the daughter being unmarried, she conveyed the estate, intending thereby to cut off the entail. She then took a deed from her vendee, and afterwards conveyed it to J. T.; and the question was, if J. T. got a fee thereby. It was held that "issue" is not a technical term of limitation, like "heirs of the body," when used in a deed; and when used in a will, it depends upon the intention of the devisor. If by "issue" the testator meant children, and not the whole line of succession, it must be a word of purchase, excluding the rule in Shelley's case. It was held here to mean children, and the estate given to the daughter was not, therefore, one in tail. The "failure of issue" was a definite one at her death. If, then, the ulterior limitation after "failure of issue" be for life, it would imply a definite failure, and not an indefinite one. So it would be if to a devisee then living. So if, on failure of issue, the estate was to go to pay testator's debts. An estate-tail may be subject to an executory devise over, on some condition or event which will abridge it. But such an executory devise may be defeated by common recovery suffered by tenant in tail which enlarges his estate into a fee, and excludes all subsequent limitations, whether in remainder or by way

[1] Karker's Appeal, 60 Penn. St. 141.

of springing use or executory devise. But a limitation over is not an executory devise, if after a definite failure of issue, but a remainder. When a limitation over is to take effect, not on an indefinite failure of issue of the prior taker, but a failure of "children" only, or on failure of issue within a given time, then the limitation will give the prior taker a life-estate, with a contingent remainder over, or a springing interest, or a fee with a conditional limitation over, as the case may be. It was held, that here the daughter took an estate for life, with a remainder to her children in fee, with an alternative limitation over in the event of her dying without issue living at her death.[1]

23. It would extend this work beyond its proposed limits to pursue this part of the subject further than to point out, in somewhat more general terms than has yet been done, the distinction between executory devises and remainders; and the rules stated by Mr. Coventry in his notes, as well as those given in the text of Mr. Watkins' treatise on Conveyancing, will perhaps serve all further necessary explanation.

[*356] "An executory * devise differs from a remainder in this, among other things, that a remainder must have a particular estate to support it, while it is essential to an executory devise that no particular estate be in existence." "By executory devise, a fee or a less estate may be limited after a fee, or a fee may be limited to commence *in futuro*." "An executory devise cannot be barred or destroyed by any act of the person taking the preceding fee, or conveyance even by feofment or matter of record." "An executory devise differs from a contingent remainder, first, because an executory devise is only admitted in last wills and testaments; second, because an executory devise respects personal as well as real estate; third, because an executory devise requires no preceding estate to support it; fourth, because, when an estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines; fifth, because an executory devise cannot be prevented or destroyed by any alteration what-

[1] Taylor *v.* Taylor, 63 Penn. St. 481; Kleppner *v.* Laverty, 70 Penn. St. 72.

soever in the estate out of which or after which it is limited."[1] "An executory devise needs no particular estate to support it, for it shall descend to the heir till the contingency happens. It is not like a remainder at the common law, which must vest, *eo instanti*, that the particular estate determines."[2]

24. It is only necessary to add a brief explanation as to the difference between contingent remainders and executory devises in the matter of their destructibility. At common law, the effect upon a contingent remainder of the destruction of the estate upon which it depends, before it shall have become vested, is to destroy the remainder, as has been heretofore explained when treating of such remainders. But there is no such connection between the interest created by an executory devise and the previous estate, that the former can be affected by any thing that may happen to the latter estate, with but one exception. If the executory devise is limited to take effect on an indefinite failure of issue in a preceding estate-tail, with a proviso whereby the devise over may take effect upon the death of the tenant at a particular time, as, for instance, a devise to A and the heirs of his body, and if A die under the age of twenty-two years, then that the land shall immediately belong to B in fee or in tail, and A suffers a recovery or bars the entail according to * law [*357] during his life, the executory interest will also be barred. B's interest, in such a case, could not be saved as a remainder, because it was to come in abridgment of A's estate-tail, and not at its regular determination.[3] But where the devise was to J. D. in fee, but if he did not marry and have issue, then there was a devise over to A, B, and C, and their heirs, and J. D., in his lifetime, conveyed the estate by deed, but died without having issue, the devise over took effect,

[1] Watk. Conv. 192, 193, 199–201, and Coventry's note; Fearne, Cont. Rem. 418; 2 Bl. Com. 173; McRee's Adm'rs *v.* Means, 34 Ala. 349; Miller *v.* Chittenden, 4 Iowa, 252; Smith *v.* Hunter, 23 Ind. 582.

[2] Taylor *v.* Biddal, 2 Mod. 292.

[3] 2 Prest. Abst. 120, 121; 4 Cruise, Dig. 349; Watk. Conv. 202, Coventry's note; Fearne, Cont. Rem. 423, 424; Wms. Real Prop. 259; Den *v.* Cox, 3 Dev. 394. Sale of the land on execution against first devisee does not affect executory devisee's right. Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 150.

and the conveyance by J. D. only passed his life-estate.[1] It is said to be the essence of an executory devise that it cannot be prevented or defeated by the first taker by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance.[2]

25. Where an executory devise is limited after a previous estate, and such previous estate fails altogether, so as to be out of the case, the executory devise takes its place. Thus, where a devise was made to B, on condition that within three months after the testator's death he executed a release, and if he neglected to do so, then a devise over to C, and B died in the lifetime of the testator, so that the devise to him lapsed and failed altogether, the devise over to C took effect, and was valid.[3] So, where there was a devise to A for life, remainder to B in fee, with a proviso that if B died without issue, then over to persons named, and B died in the life of the testator, it was held, that the devise over took effect as if there had been no devise to B.[4]

26. On the other hand, in considering how far the interest of an executory devise may be the subject of conveyance, it is said that "one of the properties of executory devises is, that they cannot be aliened or barred by any mode of conveyance; therefore, until the contingency happens upon which the limitation is to take place, executory devises create a kind of perpetuity,"[5] though equity will regard a conveyance as an agreement to convey, and hold the grantor as trustee of the grantee when the estate takes effect in the grantor.[6] The above doctrine is that of the common law, since by statute 8 and 9 Vict. c. 106, § 6, all executory interests may now be disposed of by deed.[7] And the person entitled to the executory estate may bar his own claim by release to the first taker

[1] Downing *v.* Wherrin, 19 N. H. 9.

[2] Andrews *v.* Roye, 12 Rich. 544.

[3] Avelyn *v.* Ward, 1 Ves. Sen. 420; Bullock *v.* Bennett, 31 E. L. & Eq. 463.

[4] Mathis *v.* Hammond, 6 Rich. Eq. 121.

[5] Purefoy *v.* Rogers, 2 Wms. Saund. 388 d; Wms. Real Prop. 260; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 161; Hall *v.* Chaffee, 14 N. H. 215; *post*, p. *367.

[6] Edwards *v.* Varick, 5 Denio, 664; Wright *v.* Wright, 1 Ves. Sen. 409.

[7] Wms. Real Prop. 260; Mass. Gen. Stat. c. 90, § 37.

in possession, or assign it in equity for a valuable consideration, or devise it by his last will, independently of the above statute.[1]

*SECTION II. [*358]

HOW RULES AS TO PERPETUITIES AFFECT EXECUTORY DEVISES.

1. Policy of the law in favor of free alienation.
2. Rules restricting perpetuities by means of executory devises.
3. Estates must vest within prescribed limits, to be valid.
4. Same rule applies to springing uses as to executory devises.
5. Of the time when the period of restriction begins to run.
6. Of limitation determined by "failure of issue."
7. "Failure of issue," and the like, implies an indefinite failure.
8. How the rule is modified by legislation.
9. Difference of effect of failure of issue in first taker, and a stranger.
10–14. Cases where failure of issue is held to be a definite failure.

1. Under the rule of common law, or even that of the statute above cited, the result might be, in cases where the person who is to take is not yet ascertained, or not *in esse*, that limitations, if there were no restraint as to time, might be so framed as to lock up estates in families from alienation for any period of time which the owner might desire, by means of executory devises, to take effect at future times, and in favor of unborn persons, however remote. The same might also be done by means of springing and shifting uses created by deeds. The policy of the common law, on the other hand, has ever been in favor of a free alienation of lands, and every attempt to clog this by legislation has been unsuccessful. The courts have always found some mode of reaching what the sound and salutary policy of the law demanded. Thus, when the statute "*De Donis*" was passed, whereby estates were to be locked up by entails, the courts, in Taltarum's case, as early as the 12 Ed. IV., suffered the estate to be aliened by means of common recoveries, and

[1] Watk. Conv. 202; Jones *v.* Roe, 3 T. R. 88.

would not allow this power to be impaired or defeated by any agreement that such recovery should not be suffered.[1]

2. To meet the emergency presented by the opportunity afforded for locking up and perpetuating estates by means of springing and shifting uses and executory devises, the courts prescribed certain rules against perpetuity which have become uniform and imperative wherever the common law prevails. These rules were borrowed from the limits practically set in the limitations which had become common in England, from having been inserted in the disposition of estates in families there, which were known as "strict settlements." These were, substantially, limitations first to the use of the settler himself until a contemplated marriage took place, [*359] then to the use of the husband * and wife for life, with remainder to the use of their first and other sons in tail; this being as far as the limitations could go without the intervention of trustees. Now, as the power to bar an entail by a common recovery was incident to the estate itself, and the heir in tail in such a case could, by joining with the tenant for life and suffering a recovery, defeat the entailment as soon as he was twenty-one years of age, it practically amounted to locking up the land from alienation, only till the son became twenty-one years of age.[2] In analogy with the practical operation under this limitation, the courts adopted, as the period beyond which estates might not be so limited as not to be alienable, the duration of a life or lives in being and twenty-one years after. This restriction is called the "rule against perpetuities." "Perpetuities" are defined to be "grants of property wherein the vesting of an estate or interest is unlawfully postponed."[3] And where the terms of the limitation had reference to the infancy of the person who was to take, an infant *en ventre sa mère* was held to be within the rule, and a period might be added to the twenty-one years sufficient to cover the ordinary time of gestation of such child. Finally, it was held, that if the first life, by which the limitation was to be measured, were that of an infant *en ventre*

[1] *Ante*, vol. 1, pp. *70, *71.

[2] See Appendix, *post*.

[3] Philadelphia *v.* Girard, 45 Penn. St. 26; Sand. Uses, 196.

sa mère when the limitation took effect, the child was to be considered as alive, and consequently the ordinary period of gestation of an infant, when referred to as one of the persons whose lives were to measure the duration of the limitation, might be made to precede and be added to the actual period of life or lives in being and twenty-one years and the ordinary time of an infant's gestation. The history and reasons of this rule may be found in the authorities cited below.[1] A present gift to a charity is never a perpetuity, though intended to be inalienable, and no vested grant is a perpetuity.[2]

3. Not only is the rule, thus modified, imperative in its bearing upon the limitation of an executory interest, but the limitation, in order to be valid, must be so made that the estate not * only may, but must, vest in possession [*360] within the prescribed period. If, by any possibility, the vesting may be postponed beyond this period, the limitation will be void. And the effect of a limitation over being void by reason of its being too remote is, that the instrument, the will for instance, is to be construed as if no such clause were inserted in it, and the first taker holds his estate discharged of the condition or limitation over. If this be in terms for life, he has a life-estate ; if in fee-simple, he has a fee-simple absolute.[3] Where a vested estate is given distinctly, and there are annexed to it conditions, limitations, powers, trusts, including trusts for accumulation, or other restraints relative to its use, management, or disposal, that are not allowed by law, it is those restraints and the estates limited on them that are void, and not the principal or vested estate.[4] If, by possibility, it may not vest within the prescribed limits

[1] Lewis, Perpet. 155, Ch. II.; 1 Jarm. Wills, 223 ; Cadell *v.* Palmer, 1 Cl. & F. 327 ; s. c. 10 Bing. 140, and Tud. Lead. Cas. 357 *et seq.*, where the whole case, with valuable annotations, will be found ; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 152 ; Anderson *v.* Jackson, 16 Johns. 399 ; Hawley *v.* Northampton, 8 Mass. 3, 38 ; Andrews *v.* Roye, 12 Rich. 542.

[2] Philadelphia *v.* Girard, 45 Penn. St. 26.

[3] Tud. Lead. Cas. 361, 379 ; Purefoy *v.* Rogers, 2 Wms. Saund. 388 f ; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 153, 156 ; 6 Cruise, Dig. 372 ; 1 Jarm. Wills, 233, 783 ; Nottingham *v.* Jennings, 1 Salk. 233 ; Watk. Conv. 197, Coventry's note ; Lewis, Perpet. 170, 657, 658 ; Beard *v.* Westcott, 5 B. & Ald. 801 ; Sears *v.* Russell, 8 Gray, 100.

[4] Philadelphia *v.* Girard, 45 Penn. St. 27.

of time, it is a void limitation, although, in the end, it does in fact happen that the person might have taken within the time fixed by the rule.[1] And a limitation extending beyond the period of perpetuity, and therefore void as to that part, is void in the whole, both as to the period within and that beyond the limits of perpetuity.[2] Where the devise was to trustees to pay the income of the estate to testator's daughter for life, and, at her death, to divide the residue among her children then living, and the issue of any deceased child and their heirs, and, in default of such child, to convey to the heirs-at-law of the testator, if a child should die, his share was not to go to his father, but the testator's heirs-at-law. The devise over to the heirs-at-law of the testator was held to be too remote, as it related to those who should be heirs-at-law at the decease of such child as might be born after the testator's death.[3] And the proposition is a general one, that if a limitation be, collectively, to a class, and a part of these be beyond the limits of remoteness, it will be *void* as to all.[4] But if the devise be dependent upon one of two events, one of which is too remote and the other not, and the latter event must happen within the time prescribed, it will be a good executory devise.[5] The more recent case of Evers *v.* Challis, though too long and complicated in its facts to be given in detail here, carries out the above principle in full. Lord Chelmsford says: "It is conceded that the limitation in question involves a contingency with a double aspect, depending upon events which are distinct and separate from each other. The alternative contingencies must therefore be taken as if they had been separately and distinctly expressed. Why, then, should the words of contingency, on which the void estate was intended to be limited, affect the valid estate to which they do not apply?" [6]

[1] Wood *v.* Griffin, 46 N. H. 234; Jackson *v.* Phillips, 14 Allen, 572.

[2] St. Amour *v.* Rivard, 2 Mich. 294.

[3] Sears *v.* Russell, 8 Gray, 100; Donahue *v.* McNichols, 61 Penn. St. 78.

[4] 1 Jarmyn, Perk. ed. 259, 260; Porter *v.* Fox, 6 Sim. 485; Lewis, Perpet. 457.

[5] Fowler *v.* Depau, 26 Barb. 224; Armstrong *v.* Armstrong, 14 B. Mon. 333.

[6] Evers *v.* Challis, 7 H. L. Cas. 555; Jackson *v.* Phillips, 14 Allen, 572, in which case the devise was to trustees to pay over the income to the son of the

4. It is simply necessary to add, that the same rules apply to springing and shifting uses as to executory devises in the matter of perpetuity.[1]

5. The period from which the time allowed by the rule begins to run, when the limitations are created by deed, is its date; when by will, it is the death of the testator.[2]

6. Among the forms of expression indicating the time at which a prior limitation is to determine, and an executory limitation which is to await it is to take effect, few if any have led to so much discussion, and difficulty of application, as those which relate to the failure of issue in some person designated. The expressions ordinarily made use of to indicate this contingency are often equivocal, whether the time to which they refer for the failure of issue is the death of some person named, or is the period when the issue, regarded as a particular line of succession, shall have run out and become extinct. If the latter, it obviously may not occur for a series of generations, extending altogether beyond the period of legal perpetuity.[3]

7. The common law, from the contingency involved in these forms of expression, whereby the event of such failure of issue may not occur till after a life or lives in being and twenty-one * years, seems to adopt it as a rule, [*361] that if an estate be limited by way of springing or shifting use, or executory devise, upon a "dying without issue," a "failure of issue," or the like, if there is no attendant expression indicating some definite time at which such failure is to occur, the estate will be deemed to be limited

devisor during his life, and, at his decease, to pay half the income to his children during life, and, at their death, to certain other trustees. But if the son died without children, the whole of the fund was to be paid over to these other trustees. It was held, that, as the death of the son without children, if it took place, must be within a life in being at the time the will took effect, it would be a valid devise, although, if he left children, the devise over might then be too remote.

[1] Lewis, Perpet. 153; Carwardine *v.* Carwardine, 1 Eden, 27; Wilson, Uses, 66, 73; Gilbert, Uses, Sugd. ed. 161.

[2] Tud. Lead. Cas. 361.

[3] Doe *v.* Ewart, 7 A. & E. 636; Tud. Lead. Cas. 361; Bramlet *v.* Bates, 1 Sneed, 554.

upon what is called an indefinite failure of issue, and too remote to be valid within the rule against perpetuities.[1]

8. The violence which was found so often to be done to the intention of testators and to common sense, in time led to a change in respect to this rule, by legislation both in England and in several of the United States, which will be noticed at the close of this chapter, and uniformly led the courts to seize upon any expression in the terms of the limitation which could be reasonably construed as referring such failure of issue to the death of the person of whose issue the failure is predicated.[2]

9. There is an obvious difference in the construction to be applied, whether the limitation over be upon the failure of issue on the part of the first taker, or to that of a third person, as between a devise or conveyance to A and his heirs, and, upon failure of issue of A, then over to C, and a devise or conveyance to A and his heirs, and upon the failure of the issue of B, a stranger, then over to C. In the first, it would be held to be constructively an estate-tail in A, and the limitation to C would be a remainder which is not affected by the rule against perpetuities. In the last, the devise over cannot be a remainder, as it destroys A's estate if it takes [*362] effect; and not being to * take effect until after an indefinite failure of issue, namely of B, it is too remote, and therefore void.[3] A devise to A for life, and, after his death, to his male heirs, and if he die without male heirs,

[1] Forth *v.* Chapman, 1 P. Wms. 663; Tud. Lead. Cas. 361, 556, 558; Wms. Real Prop. 177; Wilson, Uses, 66, 77; Hall *v.* Priest, 6 Gray, 18, 20; Terry *v.* Briggs, 12 Met. 22; Anderson *v.* Jackson, 16 Johns. 382; Hall *v.* Chaffee, 14 N. H. 220, 226–239, and cases there cited; Dallam *v.* Dallam, 7 Harr. & J. 220; Hollett *v.* Pope, 3 Harring. 542. In Connecticut it was held, that "dying without children" meant children living at the death of the devisee named. Morgan *v.* Morgan, 5 Day, 517. See Black *v.* McAuley, 5 Jones (N. C.), 375; Gray *v.* Bridgeforth, 33 Miss. 312; Moffat *v.* Strong, 10 Johns. 12; Kay *v.* Scates, 37 Penn. St. 39; Jackson *v.* Dashiel, 3 Md. Ch. Dec. 257; Bell *v.* Scammon, 15 N. H. 381; Curry *v.* Sims, 11 Rich. 490.

[2] 4 Kent, Com. 278; Doe *v.* Ewart, 7 A. & E. 636, where most of the previous cases are cited and commented on; Hall *v.* Chaffee, 14 N. H. 221–224, also reviewing the decided cases; Dallam *v.* Dallam, 7 Harr. & J. 237; Moore *v.* Howe, 4 Mon. 199; Hollett *v.* Pope, 3 Harring. 546; 2 Am. Law Mag. 88; Bell *v.* Scammon, 15 N. H. 391.

[3] Tud. Lead. Cas. 361; Terry *v.* Briggs, 12 Met. 22.

then to his female heirs, was held, as to the female heirs, to be too remote a limitation, and therefore void.[1] So in a devise to several, and, if either died without lawful issue, his part to descend to the others with a devise over, each devisee took an absolute estate, the devises over being too remote.[2]

10. But, before enlarging upon this important distinction, it may be well to refer to a few cases where courts have availed themselves of slight circumstances to give to such devises a construction which regards the failure of issue as relating to a definite period of time, and not an indefinite failure. In the often-cited case of Pells *v.* Brown, the devise was to Thomas and his heirs, and if he died without issue, living William, then to William, and it was held to be a definite failure of issue, relating to the time of Thomas's death, for it was contemplated, that, if it took place at all, it should be in the life-time of William.[3] So, where the devise was to the wife for life, and at her death to the daughter in fee, "if then living, and her issue if any, but if she should then be dead, or afterwards die leaving no issue," — it was held, that it intended issue living at her death.[4] In another case, the devise was to R. and J. and their heirs; and if either of them died before the age of twenty-one, and without issue, then over. It was held, that the time of the failure was fixed and definite; namely, their coming of age at twenty-one. And this was one of the numerous cases in the books, where, in order to carry out the intent of the testator, "or" was construed to mean "and."[5] Where the devise was "if a son die without heirs, *or* before he becomes twenty-two years of age," &c., "*or*" was held to mean *and*.[6]

11. A devise of personal property was made to the wife of the testator, with an implied limitation to her issue after her, which, as will be shown hereafter, was equivalent to a devise

[1] Conklin *v.* Conklin, 3 Sandf. Ch. 64.

[2] Shephard *v.* Shephard, 2 Rich. Eq. 142.

[3] Pells *v.* Brown, Cro. Jac. 590; Purefoy *v.* Rogers, 2 Wms. Saund. 388 c.

[4] Griswold *v.* Greer, 18 Geo. 545.

[5] Dallam *v.* Dallam, 7 Harr. & J. 220; Tud. Lead. Cas. 558; Eastman *v.* Baker, 1 Taunt. 174; Price *v.* Hunt, Pollexf. 645; Bell *v.* Scammon, 15 N. H. 381.

[6] Doebler's Appeal, 64 Penn. 14; Scott *v.* Guernsey, 48 N. Y. 121.

in fee of real estate, as there is no such thing as an estate-tail in personal property. There was also a devise over "at her death, leaving no lawful issue;" and it was held to relate to the time of her death, so that the devise over was good, as an executory one.[1]

12. A devise was limited to H. B. and her heirs, "provided she should die without issue, born alive of her body, to heir her estate." This was held to confine the contingency to the having of issue, and that such issue should be *in esse*, so as to "heir her estate," when it was in a condition to descend to heirs; namely, at her death.[2]

[*363] *13. So a devise over after a gift to A and his heirs, if he should die leaving no issue *behind* him, was held to be a good executory devise, the words "behind him" having been held to refer to the first taker's death, and to restrict the leaving no issue to that period.[3]

14. So if the devise over be of a life-estate, dependent upon a failure of issue in the first taker, the utter improbability of the life-estate ever taking effect negatives the idea that the testator intended to have it wait for an indefinite failure of issue.[4]

[1] Moore *v.* Howe, 4 Mon. 199. See also Purefoy *v.* Rogers, 2 Wms. Saund. 388 k; Forth *v.* Chapman, 1 P. Wms. 663; Hall *v.* Priest, 6 Gray, 18; 2 Jarm. Wills, 249, n.

[2] Hall *v.* Chaffee, 14 N. H. 215.

[3] Porter *v.* Bradley, 3 T. R. 143; Ide *v.* Ide, 5 Mass. 500, 502.

[4] Trafford *v.* Boehm, 3 Atk. 440; Tud. Lead. Cas. 558; Roe *v.* Jeffery, 7 T. R. 589; Ide *v.* Ide, 5 Mass. 500, 502; 6 Cruise, Dig. 391; Fearne, Cont. Rem. 488; Oakes *v.* Chalfont, Pollexf. 38. For the law generally on this subject, see Forth *v.* Chapman, 1 P. Wms. 663; Tud. Lead. Cas. 361–366, 556–561; 2 Jarm. Wills, 418, c. 42, and Perkins' notes for American cases; 4 Kent, Com. 273–279.

SECTION III.

LIMITATION UPON "FAILURE," ETC., WHEN REMAINDERS OR OTHERWISE.

1. Limitation over, upon failure of issue of first taker.
2. Of like limitations over, where the issue is of a stranger.
3. When such limitations are estates-tail, and when executory devises.
4. Limitation after failure, &c., good, if it must happen within a life, &c.
5. These rules apply to springing uses and executory devises.
6. Construction more liberal as to such uses than as to executory devises.
7. Rule, as to words of limitation, more strict in deeds than wills.
8–10. Cases of limitations of future interests by deed too remote.

1. As has been already stated, where there is a limitation to one generally, or to him and his heirs, with a limitation over upon an indefinite failure of issue of such first-named devisee, which, if construed to be an executory devise, would be void, by reason of being too remote, the courts sustain it as a remainder, and give effect to it accordingly, on the ground that the testator's making the continuance of the estate in the first taker to depend upon his having issue showed that it was intended he should take an estate-tail, which, as before said, will sustain a remainder, however remote may be the time when it shall vest in possession. This matter is fully illustrated by Shaw, C. J., in Nightingale *v.* Burrell, before cited.[1] In Doe *v.* Ellis, the *devise was to J. and his heirs and assigns for ever; but if he should die without issue, then to go to the child of which the testator's wife was *enceinte*. It was held that the subsequent clause explained and limited the term "heirs" to mean issue, and the estate of J. to be an estate-tail, and the limitation over was held good.[2] [*364]

[1] Nightingale *v.* Burrell, 15 Pick. 112, 113; Tud. Lead. Cas. 361; 6 Cruise, Dig. 379; Lion *v.* Burtiss, 20 Johns. 489; Bells *v.* Gillespie, 5 Rand. 273; Terry *v.* Briggs, 12 Met. 22; Hall *v.* Priest, 6 Gray, 18; Doe *v.* Ellis, 9 East, 382; Bamfield *v.* Popham, 1 P. Wms. 57, note. It will be seen, *post*, p. *365, that a different rule prevails in construing a limitation to one and his heirs, and upon his decease without issue, then over, in case of limitations by deed to uses, and those by will. If by deed, it is not held to be an estate-tail. Wilson, Uses, 115; Abraham *v.* Twigg, Cro. Eliz. 478; Moore *v.* Rake, 2 Dutch. 572; Sears *v.* Russell, 8 Gray, 92, 93.

[2] Doe *v.* Ellis, 9 East, 383.

2. The distinction, as before stated, seems to depend upon the question, whether the failure is of such issue as could have taken the estate in succession, or is of the issue of one who is a stranger to the estate, or one whose issue could not take under the limitation or issue, as distinguished from general heirs. Thus, if the first taker take a fee-simple, and the devise over, upon the contingency of his dying without heirs, is to a stranger, such limitation will be an executory devise, and not a remainder.[1] The court, by way of illustrating a proposition substantially like the above, in one of the cases cited, say: "If the devisor had by his will said, 'My son shall have my land to him and his heirs in fee-simple, so long as any heirs of the body of A and B shall be living, and, for want of such heirs, I devise my land to W. R. and his heirs,' W. R. 'shall take as by a future and executory devise.'"

3. So if the devise over be to A and his heirs, if J. S. die without issue, and J. S. is a stranger, it will be an executory devise to A, since it is the limitation of a freehold *in futuro*, and too remote to be good.[2] But where the devise over upon the failure of heirs of the first taker is to one who would be an heir of the first devisee, it is construed to create an estate-tail in the first devisee, and that the word "heirs" must intend heirs of his body, since it would be absurd to devise over to the heirs of one who has, by the same devise, a fee-simple; whereas, if the devise over had been to a stranger, the estate of the first taker would have been a fee-simple.[3]

4. But though the cases thus far supposed, where [*365] an executory *devise over upon failure of issue has been held good, have been those where reference was had in the limitation to the time of the death of the ancestor, yet it would be sufficient that the time must come, if at all,

[1] Grumble *v.* Jones, 11 Mod. 207, s. c. 2 Eq. Cas. Abr. 300, s. c. Willes, 167, note; Gardner *v.* Sheldon, Vaugh. 270; Tud. Lead. Cas. 363; Sears *v.* Russell, 8 Gray, 93.

[2] Fearne, Cont. Rem. 524, Butler's note; 2 Fearne, Cont. Rem., Smith's ed. § 714; Tud. Lead. Cas. 361; Badger *v.* Lloyd, 1 Ld. Raym. 526, s. c. 1 Salk. 233, s. c. by name of Badge *v.* Floyd, Com. 65.

[3] Preston *v.* Funnell, Willes, 165; Grumble *v.* Jones, Id. 167, note; Attorney-General *v.* Gill, 2 P. Wms. 369; Webb *v.* Hearing, Cro. Jac. 415; Tyte *v.* Willis, Cas. temp. Talb. 1; Sears *v.* Russell, *sup.*

within the limit of twenty-one years after the death of such ancestor. An executory devise limited after the failure of issue of the ancestor named would be good as such, if, connected with it, is an express provision that this is to take place, if at all, within a period of twenty-one years after the death of such ancestor. And the same is true of shifting uses.[1]

5. To avoid misapprehension from the nature of the cases chiefly selected for illustrating the application of the rule against perpetuities, it should be remarked, that this rule applies to every class of executory devises, as well as springing and shifting uses, whether the subject of such limitation be an estate of inheritance, a term for years, or a personal chattel.[2]

6. It may, however, be regarded as a rule of construction, that courts exercise a greater degree of liberality in construing a dying without issue, &c., a definite failure of issue, where the limitation is by springing or shifting use, than in case of a devise, from the disinclination there is to so construe a will as to disinherit the heir-at-law.[3]

7. There is, however, a greater strictness in respect to the formal terms of limitation required to define the estate to be created where it is done by deed raising and declaring uses, than when done by will, words tantamount to those of inheritance being necessary in a deed in order to create a fee-simple or fee-tail; and to create a fee-tail, there must also be words in some way limiting the heirs to those of the body. Thus, where an estate was conveyed to the use of A and his heirs, with a limitation over in case he died without leaving issue, this would * not reduce the term "heirs" to *heirs* [*366] *of the body*, and turn the estate into a fee-tail, as would have been the case had the limitation been made by will; but the first limitation would be a fee, and the second, instead of a remainder, a shifting use.[4]

[1] Lewis, Perpet. 188; Fearne, Cont. Rem. 470; Sheffield *v.* Orrery, 3 Atk. 282; Heywood *v.* Maunder, 2 Freem. 98; Davies *v.* Speed, 2 Salk. 675; Wilson, Uses, 67, 103, 105.

[2] Lewis, Perpet. 169; 6 Cruise, Dig. 380, 396.

[3] Wilson, Uses, 111; Forth *v.* Chapman, 1 P. Wms. 663; Hall *v.* Priest, 6 Gray, 18, 22.

[4] Wilson, Uses, 109, 115; Abraham *v.* Twigg, Cro. Eliz. 478.

8. In addition to the other cases, given by way of illustration, of limitations that would be deemed too remote if made by deeds to uses, the following may be noticed: A conveyance to the use of A for life, remainder to trustees to apply the rents, &c., until the son of D, who has no son, shall have attained the age of twenty-five years, and to convey the same to him on attaining that age. It was held by Mr. Fearne, that the limitation was too remote to be valid.[1]

9. By a deed of covenant to stand seised, one covenanted, that if he should die without issue of his body, then he did give, grant, release, and confirm the lands, &c., to E, and her heirs. It was held, that, the covenantor having died without issue, no estate had passed by the deed to E, since it was a future use to her, limited upon the indefinite failure of the covenantor's issue.[2]

10. A husband and wife levied a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, remainder to the husband's heirs. They had issue. Then the wife died, then the issue died, and then the husband. His heirs claimed the estate. But it was holden, that, as a remainder to them, the limitation was void because it had no particular freehold estate to support it, as the husband had no estate in the premises. And as a springing use, it was too remote, since, in effect, it was limited after a general failure of heirs or issue of the husband and wife.[3] One object in referring to this class of cases, by way of example, is to call the reader's attention to the different construction [*367] that is given to *a limitation over after failure of issue, where the limitation is by deed, from what is applied to one by way of devise.

[1] Fearne, Posth. Works, 391; Wilson, Uses, 146.

[2] Wilson, Uses, 78; Coltman *v.* Senhouse, Pollexf. 536.

[3] Davies *v.* Speed, 2 Salk. 675.

SECTION IV.

INTERESTS OF EXECUTORY DEVISEES.

1. Of the interest of an executory devisee before it vests in possession.
2. Such interest not an estate.
3. Distinction between vesting of a right, a freehold estate, and one in possession.
4. Of an estate contingent, and one whose enjoyment is postponed.
5, 6. Cases illustrating the distinction last stated.
7. Effect of a limitation over, upon failure of issue of testator's own body.
8. Limitation to issue of an unborn person, always void.
9. Effect of limitation after a prior one that fails.
10. Of devises held executory, though not such in terms.
11. Executory devisee may restrain waste by a prior taker.
12. Executory devise void, because first taker has estate absolutely.
13. Distinction between right of disposal as owner, and under a power.
14. Of curtesy in a fee-simple subject to an executory devise.

1. It seems proper, in this connection, to speak of the respective interests of an executory devisee, or one entitled to the executory estate of lands before the same vests in him in possession, and of the heir-at-law or prior devisee of the same devisor. In respect to the first, although, as before stated, it is not a subject of grant or alienation at common law,[1] it seems to be established, that contingent and executory estates and possibilities *accompanied with an interest* are descendible to the heir, or transmissible to the representative of a person dying; or may, at least in equity, be granted or assigned, and may be devised by him before the contingency upon which they are to depend takes effect.[2] Thus, where, after a devise to A and his heirs, there was a devise to B and his heirs, upon A's dying under twenty-one years of age, it was held, that, if B survived the testator, his interest would descend to his heirs, though he died before the contingency on which it

[1] *Ante*, p. *357; Wright *v.* Wright, 1 Ves. Sen. 411; 6 Cruise, Dig. 428; King *v.* Withers, Cas. temp. Talb. 123; Hammington *v.* Rudyard, cited 10 Rep. 52 b.

[2] Purefoy *v.* Rogers, 2 Wms. Saund. 388 k; 2 Cruise, Dig. 426; *ante*, p. *291; Den *v.* Manners, 1 Spence, 142; Kean *v.* Hoffecker, 2 Harring. 103; Lewis *v.* Smith, 1 Ired. 145; Hall *v.* Robinson, 3 Jones (N. C.), Eq. 348; Watk. Conv. 199, n., 202; *post*, p. *465; Stover *v.* Eycleshimer 46 Barb. 87.

depended had happened.[1] So where the devise was to M. and S., daughters, and their heirs, and if either died unmarried, then to Robert and his heirs, Robert, in the lifetime of the daughters, conveyed and granted to his younger son all right, title, claim, or demand he had to any estate either in law or equity under the will of the devisor, and died before [*368] the sisters. After * their death, unmarried, Robert's heir claimed the land against this grant to the younger son. The Chancellor, in giving an opinion, remarked that this interest was, "in notion of law, a possibility, which, though the law will not permit to be granted or devised, may still be released, as all sorts of contingencies may, to the owner of the land," and referred to Thomas *v.* Freeman.[2] And he held that, in this court (of chancery), a grant of a contingent interest in lands would be sustained, if made for a valuable consideration, and denied the right of the heir to claim in this case against the younger son.[3] In another case, the court of law held the possibility of an executory devise to be coupled with an interest; and that if the person is ascertained, and *in esse*, who is to take if the devise takes effect, it may be devised by such person before the contingency happens.[4] But if the person who is to take is not ascertained, there can be no valid assignment or devise of an executory interest.[5] *

* Note. — By the statute 1 Vict. c. 26, § 3, a man may now devise any kind of estate or interest in real property which would descend to him. And all executory interests may be conveyed by deed, by statute 8 and 9 Vict. c. 106, § 6. Wms. Real Prop. 168, 260.

In New York, expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession. New York Rev. Stat. tit. 2, art. 1, § 45; Stat. at Large, vol. 1, p. 674, § 35; Lalor, Real Est. 106; Pond *v.* Bergh, 10 Paige, Ch. 140. And such an interest belonging to a minor in Kentucky may

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[1] Goodtitle *v.* Wood, Fearne, Cont. Rem. 548, 551; Willes, 211; Goodright *v.* Searle, 2 Wils. 29; Sheriff *v.* Wrothom, Cro. Jac. 509.

[2] Thomas *v.* Freeman, 2 Vern. 563.

[3] Wright *v.* Wright, 1 Ves. Sen. 409; Edwards *v.* Varick, 5 Denio, 682; Watk. Conv. ed. 1838, 202.

[4] Jones *v.* Roe, 3 T. R. 88; Watk. Conv. 199, Coventry's note; 2 Prest. Conv. 269, 270; Goodtitle *v.* Wood, Willes, 211; Jackson *v.* Waldron, 13 Wend. 178.

[5] 2 Prest. Conv. 270; 6 Cruise, Dig. 27, note; Smith, Real Prop. 248; Stover *v.* Eycleshimer, 46 Barb. 87.

2. But still, so far from the executory devisee taking any *estate*, in the proper sense of the term, even where the executory devise is dependent on the arrival of a future period only, *and not on a contingent event, so that [*369] the executory devise is sure to take effect on the day appointed, the heir will take the whole fee in the interim, and not a mere term bounded by the ascertained continuance of his estate. In case the future interest is created by deed to uses, the fee will be in him from whom the land moves, and who corresponds to the heir in case of a devise. The reasons, which are technical in their character, as given by Mr. Butler, are these: The executory devisee can have no estate in possession, as he has no right of present enjoyment. He has no estate in remainder, for his right is not expectant upon a prior determinable estate. He has not a contingent interest, as he is in being, an ascertained person, and the event on which he is to take is certain; and he has not a vested estate, as the whole is vested in the grantor if the limitation is by deed, or the testator's heir, if it is by will, until the event happens. He has therefore no estate, the limitation being executory, and conferring on him a certain fixed *right* to an estate in possession at a future time.[1] This may seem somewhat refined and speculative; but it is not difficult to imagine cases where distinctions as nice as these may be important in determining the effect of wills and conveyances of estates, and the rights of parties under them.

3. This distinction should be kept in mind, between the vesting of a *right* to a future estate of freehold, the vesting of a *freehold estate* in interest, and the vesting of the same *in possession*. It may be illustrated by the case of a limitation

be sold by his guardian by order of court. Nutter *v.* Russell, 3 Met. (Ky.) 166.

In Massachusetts, where an executory devise or other estate in expectancy is so granted or limited to any person, that, in case of his death before the happening of the contingency, the estate will descend to his heirs in fee-simple, such person may, before the happening of the contingency, sell, assign, or devise the premises subject to the contingency. Gen. Stat. c. 90, § 37.

The same is the law of Maine. Rev. Stat. 1857, c. 73, § 4; 1871, c. 73, § 4.

[1] Fearne, Cont. Rem. 1, Butler's note; Watk. Conv. 199, Coventry's note; Wms. Real Prop. 260; 1 Jarm. Wills, 792.

to A for two hundred years, remainder to the unborn son of B, then living, in tail, remainder over. Now, for obvious reasons, the limitation to the unborn son cannot be a remainder, for it is a contingent freehold, and there is no freehold estate to sustain it. It is not too remote to be a good executory devise, since the son must be born, if at all, in the life of B, or a few months after his decease; and his estate being one in tail, would, if it took effect, support the limitation [*370] of the remainder over. If B * died without a son, the devise over at once took effect, subject only to the term of A for years. But if a son was born to B, the freehold would vest in him, although his enjoyment or possession of the land would be postponed till after the expiration of the term in A.[1] And the remainder over, expectant upon the determination of the estate-tail in the son, would at once become vested in interest, if to a person then ascertained *in esse*.[2] But if the limitation to the unborn son had been too remote to take effect as an executory devise, the remainder over, dependent upon it, would have failed altogether.[3] If, however, the limitation as an executory devise had been upon two events, one too remote and the other not, and the latter event had happened, the devise would have taken effect and been valid.[4]

4. This distinction between the vesting of a right, and the vesting of an interest in possession, is often referred to in determining whether a devise, for instance, is of a contingent right depending upon the happening of a prior event, or of a right which is absolute, and the enjoyment of which only is postponed until the happening of such event. The proposition is undoubted, that a contingent interest may vest in right, though it does not in possession, and that contingent or executory interests may be as completely vested as if they were in possession. And a future interest may vest, and afterwards be liable to be divested by the happening of some event.[5] An

[1] Gore *v.* Gore, 2 P. Wms. 28; 6 Cruise, Dig. 380; Wilson, Uses, 68.

[2] 6 Cruise, Dig. 410; Fearne, Cont. Rem. 526.

[3] 2 Prest. Abst. 155; 6 Cruise, Dig. 381, 409; Proctor *v.* Bath, 2 H. Bl. 358; Wilson, Uses, 146. See Fearne, Posth. Works, 283–293.

[4] Minter *v.* Wraith, 13 Sim. 52; Jackson *v.* Phillips, 14 Allen, 572.

[5] Barnes *v.* Allen, 1 Brown, Ch. 181; Malim *v.* Keighley, 2 Ves. 335; Sumner's note; Perry *v.* Woods, 3 Ves. 208, Sumner's note; Blanchard *v.* Blanchard, 1 Allen, 223; McCullough *v.* Fenton, 65 Penn. St. 419.

estate to A, on his arriving at the age of twenty-four, and in case he does not attain to that age, or leave issue, then to C D, is a vested estate in A, subject to be divested if he die before he is twenty-four and without issue.[1]

5. The last citations are mostly cases of personal estate; but the following is sufficient to explain what has been said upon the point in the text, if different rules were adopted as to real and personal estate. The testator devised in this case to the wife all his estate, including the realty, so long as she *remained his widow. If she married again, he gave [*371] her half the personal and the improvement of one-third of the real estate for life. He gave to N. and his heirs all his real estate, and willed that he should come into possession of two thirds on the wife's marriage, and the other third at her decease; but that if N. died before coming into possession of the estate, and should leave no issue, then he gave it all to E. and G., and their heirs, in equal shares, they to come into possession at the respective times when N. was to have taken possession if he had lived. If either E. or G. came into possession of the same, and should have no issue, his share to go to the survivor and his heirs. The wife did not marry again. The first question was, whether, as N. was only to come into possession upon her marriage, his estate in the two-thirds was not defeated by her dying unmarried, and that, therefore, his estate in the two-thirds was contingent. But the court held, that the estate was vested in N., but subject to the right of the wife, so as not to vest in possession so long as she lived unmarried, and liable to be divested if he died without issue before her death. Had N. died without issue in the lifetime of the wife, E. and G. would have taken the estate by way of executory devise.[2]

6. Another case illustrating the difference there is between devising a vested estate, of which merely the future enjoyment depends upon a contingency, and the devise of a mere right to an estate which depends upon a contingency for its ever vesting as an estate in interest, would be this: "A, having a reversion subject to an estate-tail, devised it to J. S. J. S., in such case, immediately upon the death of the testator, had a

[1] Whitter *v.* Bremridge, L. R. 2 Eq. 736. [2] Ferson *v.* Dodge, 23 Pick. 287.

vested estate, such as the testator's own estate was. But the period of its enjoyment must necessarily be postponed till the line of issue of the tenant in tail should have failed. The devise, in such a case, is an executed, and not an executory one. But if, instead of taking this form, the devise had been to J. S. upon or after the failure of the issue of a stranger, it would, as heretofore explained, have been an executory de-
[*372] vise, and * void, by reason of being too remote.[1] And the same law prevails as to springing and shifting uses.[2]

7. What may at first sight seem to be in opposition to this idea so often repeated, that an executory devise is too remote and void if made upon the indefinite failure of issue, is the case of a devise over upon the failure of issue of the testator's own body, which has been held to be good. But this is upon the ground that such a devise is only conditional, and must take effect, if at all, at the testator's death, and is consequently not against the rule of perpetuities.[3]

8. The rule already mentioned is one of universal application, that a limitation to the issue of an unborn person would be, under all circumstances, too remote and void if he is to take as a purchaser.[4]

9. At the hazard of repetition, the following proposition is given, as affording a clearer understanding of the effect of successive limitations of the same estate: All limitations subsequent to an executory devise are themselves executory. But if an executory devise fail to take effect at all, by reason, for example, of the devisee dying in the life of the devisor, and the devise lapsing, or by the limitation thereby made being void, the subsequent limitations of the estate would take effect in the same manner as if such void or lapsed devise had never been made, unless the subsequent limitations are made to depend for their vesting upon the same condition on which the prior estate depended, and that, being too remote, was

[1] Badger *v.* Lloyd, 1 Ld. Raym. 523, s. c. 1 Salk. 233. See also Badge *v.* Floyd, Com. 65; Fearne, Cont. Rem. 524, Butler's note.

[2] Wilson, Uses, 78, 79.

[3] Cruise, Dig. 388; Sanford *v.* Irby, 3 B. & Ald. 654.

[4] Ilay *v.* Coventry, 3 T. R. 86; Watk. Conv. 195, 196, Coventry's note.

void. In other words, if the estates limited were fees, these would be deemed to be successive limitations, not upon or after each other, for each in terms takes the entire estate, but in the nature of alternative limitations, one being a substitute for the other; and if, from any cause, any one fails or is void, the next in order takes its place, if within the proper limits of perpetuity,[1]

*10. There are cases where courts construe a de- [*373] vise as an executory one, though not so in terms, in order to give effect to the intent of the testator. Thus, if a devise were to the heirs of J. S., or the oldest son of A. B., and at the death of the testator J. S. were alive, or A. B. had no son, the devise would literally be void, because there was then no such person extant, and wills speak at and from the testator's death. But in such cases courts hold the devise to be future and executory in favor of whoever may be the heirs of J. S. at his death, or of A. B's son, whenever born, if from any circumstances, however slight, the will admits of that construction.[2] So where a devisor gave an estate by his will to his wife for life, remainder to his two children, and both wife and children were slaves. In his will, he directed his executors to purchase the freedom of his children. His wife died during his life. It was held, 1st, that, upon his death, the remainder dependent upon his wife's death took effect, but for the incapacity in the devisees to take by reason of being slaves; 2d, that, when the executor had complied with the directions in the will by redeeming them to freedom, the children took as executory devisees under the will.[3] And where the devise was to a wife for life, with a remainder from and after her death, contingent in its terms, and she declined to accept the devise, it was held, that the devise over took effect as an executory devise.[4] So where the devise was to a wife for life, with remainder over, and she waived the devise and took her dower, the devise over took effect at once, as if

[1] Fearne, Posth. Works, 289, 292; Lewis, Perpet. 421; 6 Cruise, Dig. 412; Fearne, Cont. Rem. 508, and Butler's note; 1 Jarm. Wills, 789–791. See *ante*, p. *353; Burbank *v.* Whitney, 24 Pick. 146; Jackson *v.* Phillips, 14 Allen, 572.

[2] 6 Cruise, Dig. 422; Goodright *v.* Cornish, 1 Salk. 226; Doe *v.* Carleton, 1 Wils. 225; Fearne, Cont. Rem. 537; Harris *v.* Barnes, 4 Burr. 2157.

[3] Darcus *v.* Crump, 6 B. Mon. 365. [4] Thompson *v.* Hoop, 6 Ohio St. 480.

no prior estate had been limited; though it hardly need be observed, that it was not to illustrate an executory devise, but the effect given by law, where a prior devise fails, to a subsequent one, that the cases mentioned below are cited here.[1]

11. If one in possession of lands, in which another has an interest as an executory devisee, undertakes to commit malicious or unreasonable waste, equity will interpose in favor of such devisee to prevent its commission.[2]

12. There is one class of cases, where, though there be a devise in form, that is, a limitation over after a preceding estate, it may be inoperative and void, by reason of the first estate being constructively an absolute fee. The question in such cases grows out of the character of the first estate; that is, whether it is determinable or not. The test usually applied in such cases is, whether or not the first taker has the right and power of absolute disposal of the estate. If he has, it is construed to be an unqualified gift to him, and the devise over will be void. Thus, a devise of certain lands to one's son A and his heirs and assigns for ever, with this clause, "It is my will that if my son A shall die and leave no lawful heirs, what estate he shall leave, to be equally divided between J. and N., to them and their heirs for ever;" in terms, this is an executory devise to J. and N., expectant upon A's dying without lawful heirs. But as the latter clause limits this to only what A "shall leave," it implies that he may, if he please, use or dispose of the whole, and [*374] * therefore what he leaves, if any thing, is his own, and not something in which the testator had a reversionary interest.[3] But a devise to A B, to his heirs and

[1] Yeaton *v.* Roberts, 8 Foster (N. H.), 465, 468; Holderby *v.* Walker, 3 Jones, Eq. 46; 1 Jarm. Wills, 513.

[2] Robinson *v.* Litton, 3 Atk. 209.

[3] Ide *v.* Ide, 5 Mass. 500; *ante*, p. *225; Attorney-General *v.* Hall, Fitzg. 314; Burbank *v.* Whitney, 24 Pick. 146; Ramsdell *v.* Ramsdell, 21 Me. 288; Pickering *v.* Langdon, 22 Me. 413; Jackson *v.* Bull, 10 Johns. 19; Jackson *v.* Robins, 15 Johns. 169, s. c. 16 Johns. 568; 1 Jarm. Wills, Perk. ed. 792, n.; Hall *v.* Robinson, 3 Jones, Eq. 348; McRee's Adm'rs *v.* Means, 34 Ala. 349, 372; Ross *v.* Ross, 1 Jac. & Walk. 154; Bourn *v.* Gibbs, 1 Russ. & M. 615; Newland *v.* Newland, 1 Jones, L. 463. But see Smith *v.* Bell, 6 Peters, 68; Bull *v.* Kingston, 1 Meriv. 314; Doe *v.* Stevenson, 1 C. B. 448; Sears *v.* Russell, 8 Gray, 100.

assigns for ever, to his use, behoof, and benefit in fee-simple, but, should he die without issue, it is my wish and will he should give it to J. S., was held a good executory devise to J. S.[1] Though if an estate is given to one generally, with a power of disposal, it carries a fee, if it be to one for life in terms, it will not enlarge it to a fee, that there is a power of disposal of the reversion annexed to the estate given.[2] Thus if one devise certain lands to her use, and to be at her disposal, it is a fee, although there be a devise over; but if it were for her use and maintenance, with a power of disposal, if she should require it, or deem it expedient to do so, with a devise over, it would give her a life-estate only, with a conditional power of disposal.[3] And where it was given to a wife to dispose of in any way she saw fit during life, with remainder to J. S., it was held to be a good remainder, and that she could not defeat it by any act of hers.[4] Nor does a power appended to an express estate for life enlarge it into a fee.[5] But where it was given to A for life, or to dispose of as she should see fit, it was held to be a devise of a fee.[6]

13. But if, in a case like that above supposed, the power of disposal in the first taker is merely a technical power of appointment, and not a right to dispose of the estate as his own property, a limitation over as an executory devise may be good, though, if such power were executed, it might leave nothing to pass by the devise over.[7]

14. It may be added, that if a *feme covert* is seised of a fee-simple, and there is an executory devise over, and the estate is defeated by the happening of the event on which the execu-

[1] McRee's Adm'rs *v.* Means, 34 Ala. 349, 372; *ante*, vol. 1, p. *54.

[2] Jackson *v.* Robins, 16 Johns. 588; Flintham's Appeal, 11 S. & R. 19; Morris *v.* Phaler, 1 Watts, 390; Hess *v.* Hess, 5 Watts, 191; Smith *v.* Starr, 3 Whart. 62; Girard L. Ins. Co. *v.* Chambers, 46 Penn. St. 490.

[3] Terry *v.* Wiggin, 47 N. Y. 512; Burleigh *v.* Clough, 52 N. H. 267, and a remainder over in such case would be good as a vested estate.

[4] Edwards *v.* Gibbs, 39 Miss. 174; Rail *v.* Dotson, 14 Sm. & M. 176.

[5] Andrews *v.* Brumfield, 32 Miss. 115.

[6] Second Reformed Church *v.* Disbrow, 52 Penn. St. 219.

[7] Tomlinson *v.* Dighton, 1 P. Wms. 171; Lerned *v.* Bridge, 17 Pick. 339; Rubey *v.* Barnett, 12 Mo. 1; Reid *v.* Shergold, 10 Ves. 370; Andrews *v.* Roye, 12 Rich. 536.

tory devise depends, the husband would nevertheless be entitled to curtesy in the same.[1]

SECTION V.

EXECUTORY DEVISES OF CHATTEL INTERESTS.

1. Of devises of freehold interests in chattels.
2. Limitation of a chattel as a freehold, void at common law.
3. Devise of a term during life carried the entire term.
4. There can be no estate-tail of a chattel.
5. Devise to one and the heirs of his body is an entire property.
6. Devise of a term for life with remainder, when good.
7. Devise of the use the same as of the thing itself.
8. The nature of the use often defines the estate intended.
9. Devise of personalty may be for life, with remainder.
10. Devise of personalty for subsistence of devisee.
11. If devise is absolute, a devise over is void.
12. Same rules apply to the third as to the first and second classes.
13. Rule as to perpetuities the same.
14. Executory devise good, though to a person unknown.

1. The third class of executory devises is of such as relate to personal estate and to chattel interests in lands, and as arise from giving to these the qualities of freeholds and estates of inheritance in lands.[2]

2. In the theory of the law, and by the definition of estates, a freehold was deemed of a higher and more comprehensive nature than a term for years; and consequently, if there is a limitation of a term for years to one for life, or for such indefinite period of time as would constitute a freehold [*375] estate, any * limitation over of the balance of such term, however long it might be, by the way of remainder, would be void.[3] On the other hand, an estate of freehold could never be derived from an estate for years; and

[1] 6 Cruise, Dig. 374; *ante*, vol. 1, p. *131.

[2] Watk. Conv. 42, Morley's note; Fearne, Cont. Rem. 401; Burt. Real Prop. § 946.

[3] Burt. Real Prop. §§ 897, 946; Cooper *v.* Cooper, 1 Brev. 355; Duke of Norfolk's case, 3 Cas. in Ch. 33; Lewis, Perpet. 84; Fearne, Cont. Rem. 4, n. 401; 1 Jarm. Wills, 793, and Perkins' note.

when an estate for years came to one who had freehold in the same lands, the term, however long, was merged in the freehold, and became annihilated.[1]

3. The consequence of these doctrines was, that, by the common law, a devise of a term to one during his life was a disposition of the entire term. Nothing was supposed to be left that could pass, and therefore there could be no limitation over of a term for years, in remainder after an estate for life or any freehold estate in the term.[2]

4. Another peculiarity in respect to chattel interests in lands, as well as personal estates generally, is, that there can be no estate-tail predicated of them. The statute *de donis* applies only to *tenements*, that is, something of which *tenure*, in the feudal sense, can be predicated, and not to chattel interests or chattels themselves.[3]

5. And the consequence of this is, that, if one devises to another a chattel interest to him and the heirs of his body, it is a devise of an absolute estate, or gift of the entire property.[4]

6. The legal inferences to be drawn from these several principles and propositions are, that upon a devise of a term for life, a devise over of a remainder of such term, or with a remainder over after a devise to one in tail, would be void. But, in order to carry out the intention of testator, such limitations were allowed by the way of executory devise; and this was * done as early as the tenth of [*376] Elizabeth. And now every future bequest of personal property, whether it be or be not preceded by a prior bequest, or be limited on a certain or uncertain event, is an executory bequest, and falls under the rules by which that mode of limitation is regulated.[5] *

* NOTE. — The analogy between this class of executory devises and that where a fee is limited after another fee is obvious, when it is considered that in

[1] 1 Cruise, Dig. 229; Burt. Real Prop. § 897; *ante*, p. *290.

[2] Tissen *v.* Tissen, 1 P. Wms. 500; Burt. Real Prop. § 946; 1 Jarm. Wills, Perk. ed. 893, n.; Manning's case, 8 Rep. 95; 4 Kent, Com. 269.

[3] Fearne, Cont. Rem. 461, 463; Burt. Real Prop. § 948; Lovies' case, 10 Rep. 87; Lewis, Perpet. 318; Seal *v.* Seal, Prec. in Chanc. 421.

[4] Burt. Real Prop. § 948; Fearne, Cont. Rem. 463, and Butler's note; 2 Rop. Leg. 2d ed. 393; Leventhorpe *v.* Ashbie, 1 Rolle, Abr. 831; Tud. Lead. Cas. 701; Doe *v.* Lyde, 1 T. R. 593; Powell *v.* Glenn, 21 Ala. 458.

[5] Fearne, Cont. Rem. 402, and Butler's note; Tissen *v.* Tissen, 1 P. Wms.

7. And the distinction that once prevailed between the devise of the use of a chattel interest, and the devise of such interest itself, is now practically exploded, although executory devises are sustained upon a theoretical idea akin to such a distinction.[1]

8. But the nature of the use intended by the devise to be made of the property devised may have the effect to define the estate or property which the devisor gives by such devise; as in the cases above cited, where the devise over of property was held void, because the first taker, by the terms of the gift, was to have the absolute and entire disposal of it.[2]

9. According to what is now a well-settled doctrine, a devise of a personal thing, like money, may be made to one for life, with a remainder over which will be good as an executory devise.[3] Thus, a limitation upon a devise to a daughter of £500, so that, if she died under thirty years of age unmarried, the same should be divided between three others, was held a good limitation to the three.[4] So where a tes-
[*377] tator gave personal goods * and chattels to be divided among his six children, and, if any of his sons died without lawful issue, his or their parts to be divided among the survivors, unless he or they so dying should leave a wife behind, in which case she was to have a certain part, and only the remainder was to be divided, it was held that the limitations over were good as executory devises.[5]

10. So, though the first taker under a devise be authorized to use and consume the property devised, and, to that extent,

both cases it is the limitation of an estate to one, when in terms the whole estate had, according to the rules of the common law, been already given to another.

500; Manning's case, 8 Rep. 95; 2 Prest. Abst. 4; 2 Bl. Com. 174; Duke of Norfolk's case, 3 Cas. in Chanc. 33; Smith *v.* Bell, 6 Peters, 68.

[1] Lewis, Perpet. 85, 87; Gillespie *v.* Miller, 5 Johns. Ch. 21; Merrill *v.* Emery, 10 Pick. 507, 511; 1 Jarm. Wills, 994, n.; 4 Kent, Com. 269; Lampet's case, 10 Rep. 46; Upwell *v.* Halsey, 1 P. Wms. 651; Fearne, Cont. Rem. 407; *post*, vol. 3, p. *622.

[2] Attorney-General *v.* Hall, Fitzg. 314; Bull *v.* Kingston, 1 Meriv. 314.

[3] Upwell *v.* Halsey, 1 P. Wms. 651; Merrill *v.* Emery, 10 Pick. 507, 511; Gillespie *v.* Miller, 5 Johns. Ch. 21; 1 Jarm. Wills, Perk. ed. 665 n.; Maulding *v.* Scott, 13 Ark. 88; Smith *v.* Bell, 6 Peters, 68.

[4] 2 Freem. Ch. 137.

[5] Moffat *v.* Strong, 10 Johns. 12; Keene's Appeal, 64 Penn. 273.

may be said to have the disposal of it, yet, if it be given for the purpose of the subsistence, for instance, of the devisee, as where provision is thereby made for the donor's wife, the right to make use of the property for that purpose is in the nature of a power, rather than an ownership, and a devise over of what the first devisee shall leave will be good as an executory devise.[1]

11. If the gift to the first taker be absolute in its terms, any devise over will be void for repugnancy.[2] And the same rule will be applied where the use only of the property is given, when, from the nature of the property, its use is its consumption. In this case it is construed to be an absolute gift.[3] But, in all these cases, the test is the intention of the testator expressed in his will. It is by a reference to that that the character of the gift is determined.[4]

12. Most of the rules which apply to the first and second classes of executory devises apply also to the third. There is, however, a much stronger disposition to construe a failure of issue on which a limitation is made to depend, a definite failure having reference to the time of the death of the ancestor of such issue, in the case of devises of chattels and chattel interests, than of freeholds. And one reason for this has already *been explained. As there can be no [*378] estate-tail of such chattel interests, and, consequently, no limitation over upon the failure of a line, whereby the intent of the testator can be carried out by construing the executory limitation as a remainder, if the limitation cannot be held to be on a definite failure of issue, it leaves the subject of the devise the absolute property of the first taker.[5]

13. Cases under the third class are within the rule against

[1] Upwell *v.* Halsey, 1 P. Wms. 652; Surman *v.* Surman, 5 Madd. 123. See Rubey *v.* Barnett, 12 Mo. 1; Smith *v.* Bell, 6 Peters, 68.

[2] Merrill *v.* Emery, 10 Pick. 507, 512.

[3] Gillespie *v.* Miller, 5 Johns. Ch. 21; Randall *v.* Russell, 3 Meriv. 194; 1 Jarm. Wills, 793, n.

[4] Smith *v.* Bell, 6 Pet. 69, where the subject is fully treated.

[5] Burt. Real Prop. § 956; Watk. Conv. 200, and Coventry's note; Hall *v.* Priest, 6 Gray, 22; Kirkpatrick *v.* Kirkpatrick, 13 Ves. 484; Brouncker *v.* Bagot, 1 Meriv. 271; Fearne, Cont. Rem. 463, and Butler's note; Lewis, Perpet. 321; 6 Cruise, Dig. 396; Powell *v.* Brandon, 24 Miss. 343.

perpetuities, in the same manner as those under the first and second; and consequently, as has been heretofore explained, if a devise over be limited upon a general failure of issue, it will be void for remoteness. Yet it has been held, that if a devise is made to one, with a devise over upon the failure of issue, this may be good, provided such failure is, by the terms of the devise, to take place within the compass of a life or lives in being, and twenty-one years and a fraction after the death of the testator. It is like the devise of a fee-simple, with a limitation over upon an event which is to happen, if at all, within the time prescribed by the rule against perpetuity.[1] And the same rule applies in cases of limitations to uses by deed, or springing uses.[2]

14. It is no more necessary that the person to whom a limitation of chattel interests in land or of chattels by way of executory devise is made should be known and ascertained, or *in esse*, in order that the devise should be valid, than in case of a similar limitation of a freehold.[3]

[*379] * SECTION VI.

POWER OF DEVISEE OVER A TERM.

1. No act by holder of a term affects the executory devisee.
2. Executory devisee of a term has no interest to be granted.
3. Limitation over of a term after failure of issue of first taker.
4. An executory limitation void, if too remote when made.
5. Of executory limitations to a class, too remote as to some of the class.

1. THOUGH the holder of a term for years is theoretically the owner of it, where it is devised to him with a contingent limitation over to another, he can do nothing to defeat or injuriously affect the interest or estate of the executory devisee.

[1] 6 Cruise, Dig. 395; Kirkpatrick *v.* Kirkpatrick, 13 Ves. 486, Sumner's note; Fearne, Cont. Rem. 445, Butler's note, 476; Jones *v.* Sothoron, 10 Gill & J. 187; 2 Prest. Abst. 135; Duke of Norfolk's case, 3 Cas. in Ch. 31; Forth *v.* Chapman, 1 P. Wms. 663.

[2] Wilson, Uses, 81.

[3] Amner *v.* Loddington, 1 Rolle, Abr. 612; 6 Cruise, Dig. 394.

Even if the holder of such a term were to acquire the inheritance of the estate by descent or otherwise, the term would not merge in the inheritance so as to affect the interest of an executory devisee of the term. And the same rule applies where the executory estate is a springing use created by deed instead of by will.[1]

2. In the latter case, morever, it was held, that the executory devisee could not grant over his interest at law, unless by way of estoppel, so long as the prior estate continued.[2]

3. What was said in a former section in respect to estates of inheritance[3] may be applied to terms for years limited by way of executory devise after the dying of another without issue: and it is sustained by authority; namely, that if the executory limitation of the term be for the life of the devisee *in esse*, to take place after a dying without issue, it will be good, for, being for the term of life of a person in being, the period of the failure of issue could not extend beyond the limits of perpetuity, since it must imply that the failure was to take place, if at all, within the limit of a life in being.[4]

4. If an executory limitation by deed or by will, either of lands or money, be too remote at the time it is to take effect, namely, the making of the deed or death of the testator, it is wholly * void; nor will any change of circum- [*380] stances avail by which the event on which it depends actually occurs within a life in being. The possibility at its creation, that the event on which it depends may be too remote, is fatal to it. In order to be good, it must be limited to vest in possession within the period prescribed by the rule against perpetuity.[5]

5. And if the devise be to a class, some of whom are, and some are not, within the prescribed limits as to vesting in

[1] 3 Prest. Conv. 463, 499; Lee *v.* Lee, F. Moore, 268; Fearne, Cont. Rem. 421; Hammington *v.* Rudyard, cited 10 Rep. 52.

[2] Lampet's case, 10 Rep. 52; Fearne, Cont. Rem. 548, 551. But see *ante*, p. *367.

[3] *Ante*, p. *374.

[4] Oakes *v.* Chalfont, Pollexf. 38; Fearne, Cont. Rem. 488; 6 Cruise, Dig. 391.

[5] 4 Kent, Com. 283; Proprs. Brattle Sq. Church *v.* Grant, 3 Gray, 146, 153; Wilson, Uses, 148.

possession, it will be void as to the entire class. Thus, where a devise is made to children, to vest in them when twenty-five years of age, not *seriatim*, but together, some of whom are born and living at the testator's death, and some may be born after, so that more than twenty-one years might elapse after the death of the persons living before some of the children would arrive at twenty-five, the devise would be void.[1] In the recent case of Evers *v.* Challis, Wightman, J., gives an explanation of the grounds upon which the case of Leake *v.* Robinson, cited below, was decided; that if the devise, in such a case, were held divisible, and "if divided after the testator's death, it might be, that the persons of the class, who were by law incapable of taking in remainder, were the very persons in favor of whom he included the whole class, and therefore, if the devise were split, the persons who would take might not be those whom it was the intention of the testator to benefit." And yet, if the class can be separated within the terms of the will, the portion of them who can take lawfully will do so, while the other will not.[2] Accordingly, it was held, that where this limitation was to a class, and was void as to some by being too remote, it might be otherwise as to others, as where the devise was to the sons of A, and, on the testator's death, each son to take for life, with remainder to his children. If A has sons living, the limitation to them would be good, but would be void for remoteness as to the sons of the sons of A born after the testator's death.[3] The following case will also serve to explain the foregoing proposition in relation to an executory devise to a class: S. B. devised his real and personal estate in trust, among other things, to sell the same and pay the income to his daughter W., and, from and after her decease, in trust for the testator's two grandsons, H. W. and C. W., and all and every other the child or children of his daughter thereafter to be born, if any, or the issue of such grandsons respectively, or other child or children, in shares to be appointed by his daughter, and, in default of such appointment, in trust for all his grand-

[1] Leake *v.* Robinson, 2 Meriv. 363; Philadelphia *v.* Girard, 45 Penn. St. 27

[2] Evers *v.* Challis, 7 H. L. Cas. 545, 547. See 1 Jarm. Wills, 246.

[3] Lowry *v.* Muldrow, 8 Rich. Eq. 241.

sons and other the child or children of his daughter thereafter to be born, if any, and the issue of such grandsons or other child or children, who, being a son or sons, shall live to attain the age of twenty-one years, &c., equally to be divided between or amongst them, such issue to take a parent's share. The daughter released her right of appointment; and a question then arose, whether the other limitation was too remote or not.

The Master of the Rolls construed the will to apply both to the living grandsons and the other children of the testator's *daughter, as well as to the issue of the [*381] grandchildren; that the words were not confined to the issue of the grandchildren, but applied to the whole class, and that the class consisted of three sets of persons; namely, the existing grandsons who are named, grandchildren thereafter to be born, and the issue of these two previous descriptions of grandchildren who may have died before the period of distribution, all of whom must attain twenty-one years before the division of the fund took place. The gift by the will, therefore, to the grandsons named, included only a portion of a class which was not to be ascertained until a period, which, by possibility, might exceed the life of W., the daughter, and twenty-one years after her decease, and was accordingly held to be too remote. Thus, it is said, before the death of W., the grandchildren alive when the testator died might all have died leaving children, and some of her children might also have been born after the death of the testator, and died before her, and left children under twenty-one, and all these might have been infants at the death of the daughter. Of these, some infant child of W., alive at her decease, might have died in infancy, leaving children who would not have attained twenty-one, and, therefore, would not have attained vested interests until more than twenty-one years after the death of W., the daughter. Nor did it make any difference in the construction to be given to the will, that such did not in the event prove to be the case, since reference can only be had to the time of the will taking effect; for it must be good or bad in its inception, if at all.[1] But in James *v.* Wynford,

[1] Webster *v.* Boddington, 26 Beav. 128; Greenwood *v.* Roberts, 15 Beav. 92

the Vice-Chancellor was inclined to hold that a gift to an individual, named and known to the testator, would not wholly fail, because there were words superadded by the testator, including a class to take with him, as to which class the gift must wholly fail, because, as to some, it might be too remote.[1] And in Cattlin *v.* Brown, the Vice-Chancellor lays down a rule upon this point, "that where a gift or devise is of a given sum of money or property to each member of [*382] a class, and the gift to each is * wholly independent of the same or similar gift to each and every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law."[2]

SECTION VII.

DEVISE FOR ACCUMULATION.

1. Under the head of Executory Devises was included the capacity which a man had at common law to lock up the income of his estate, whether real or personal, by means of a settlement upon trustees, by which the same was rendered inconvertible to the use of any one until the object of his bounty was born or attained a certain age. And provided this period did not exceed any number of lives in being, and twenty-one years and a fraction after the death of the persons by whose lives it was measured, it was a legal settlement, and would be sustained by law. This was illustrated to a remarkable degree by the history of the folly of one Thellusson, whose will gave rise to divers questions of law, which are reported in the noted case of Thellusson *v.* Woodford.[3] By this will, dated in 1796, he devised his real estate, the income of which was £4,000 per annum, and his personal estate, estimated at half

[1] James *v.* Wynford, 1 Smale & G. 40, 58.

[2] Cattlin *v.* Brown, 11 Hare, 372, 377; Griffith *v.* Pownal, 13 Sim. 393.

[3] Thellusson *v.* Woodford, 1 B. & P. N. R. 396, s. c. 4 Ves. 227; 11 Ves. 112; Fearne, Cont. Rem. 436.

a million pounds sterling, to trustees to accumulate for nine lives, till, by the ordinary chances of life, the aggregate would amount at interest to over £19,000,000, and, in one contingency provided for, to a much larger sum, then to fall to two or three persons. The will had been so drawn as to keep within the rules against perpetuity, and the courts were obliged to allow its validity and that of the provisions it contained. * But so unreasonable did the rule appear to [*383] Parliament that an act was passed, 39 and 40 Geo. III. c. 98, whereby such accumulations were prohibited for a longer period than the life of the grantor or settler, or twenty-one years from the death of every such grantor or settler, devisor or testator, or during the minorities of the persons who would be qualified to take the accumulated fund.[1] Under this act, it was held that a direction in one's will to trustees to apply the income of personal estate for the support of A, and to invest any surplus which, with the testator's personal estate, was given over after A's death, so far as investing the surplus went, was void, and the accumulations belonged to testator's next of kin.[2]

SECTION VIII.

STATUTE RULES AGAINST PERPETUITIES.

While some of the States have been content to adopt the rules of the common law against perpetuities, others have regulated the matter by statute, and especially so much of it as relates to limitations of estates upon the failure of issue, and the like. It has been the purpose, in what follows, to present an outline of the legislation upon this subject in the several States.

In Alabama, lands may be conveyed to the wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and, in default thereof, over. But conveyances to others than

[1] Wms. Real Prop. 263; Lewis, Perpet. c. 28, p. 592.

[2] Mathews *v.* Keble, L. R. 4 Eq. 467.

the wife and children, or children only, cannot extend beyond *three lives in being* at the date of the conveyance, and ten years thereafter.[1]

In Arkansas, the constitution declares that perpetuities shall not be allowed;[2] and so in Vermont.[3]

In Connecticut, no estate in fee-simple, fee-tail, or any less estate, shall be given by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will.[4]

[*384] * In Indiana, the absolute power of aliening lands may not be suspended by any limitation or condition whatever, contained in any grant, conveyance, or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, or devised, and therein specified, with the exception, that certain contingent remainders in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they obtain their full age.[5]

In Iowa, every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons in being, and for twenty-one years thereafter.[6]

In Kentucky, the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter.[7]

In New York, the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than

[1] Ala. Code, 1852, § 1309; 1867, § 1579.
[2] Ark. Const. art. 2, § 19.
[3] Const. Vt. pt. 2, § 36; Gen. Stat. 1863, pp. 25, 446.
[4] Conn. Comp. Stat. 1854, p. 630, § 4; Gen. Stat. 1875, p. 352, § 3.
[5] 1 Ind. Rev. Stat. 1852, p. 238, § 40; 1862, p. 266, § 40.
[6] Iowa, Code, 1851, p. 1191; 1873, § 1920.
[7] Ky. Rev. Stat. c. 80, § 34; Gen. Stat. 1873, c. 63, § 27.

two lives in being at the creation of the estate,[1] except in the single case that a contingent remainder in fee may be created on a prior remainder in fee, and take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person may be determined before they attain their full age. Successive limitations of estates for life are not valid unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive * estates for life, all [*385] the life-estates subsequent to those of the two persons first entitled thereto shall be void; and upon the death of those persons, the remainder shall take effect in the same manner as if no other life-estate had been created. No remainder may be created for the life of another person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor may a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term. When a remainder is created upon any such life-estate, and more than two persons are named as the persons during whose lives the life-estate shall continue, the remainder takes effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced. A contingent remainder may not be created on a term for years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. And these provisions apply to deeds as well as to wills.[2] A limitation to A for life, remainder to B for life, remainder to C and D and the survivor of them, is within the prohibition of the statute against limiting an estate for more than two lives.[3] But a remainder in fee after the expiration of two lives in being at the testator's death may be created in favor of one not in being at that time; and a

[1] Levy *v.* Levy, 33 N. Y. 129.

[2] 2 N. Y. Rev. Stat. 4th ed. 133, §§ 15–20, and 5th ed. vol. 3, p. 11, §§ 18–20; Stat. at Large, vol. 1, p. 672, §§ 15–20.

[3] Arnold *v.* Gilbert, 5 Barb. 190.

second limitation may be good to one not in being, who may be living at the death of the first remainder-man, if such remainder-man die under the age of twenty-one.[1]

In Michigan, Minnesota, and Wisconsin, the law as to remainders is the same as in New York.[2]

In Ohio, no estate in fee-simple, fee-tail, or of any lessee in lands or tenements, shall be given or granted by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of the making of the deed or will.[3]

In Mississippi, while fees-tail are prohibited, and are declared to be fees-simple, one may make a conveyance or devise of lands in succession to donees then in being, not exceeding two, and to the heirs of the body of the remainder-man, and, in default thereof, to the right heirs of the donor in fee-simple.[4]

[*386] The statute provisions as to limitations upon failure of issue, * &c., are, in substance, as follows: In New York, Indiana, Michigan, Wisconsin, Minnesota, Georgia, Alabama, Kentucky, Mississippi, Missouri, South Carolina, and California; namely, where a remainder is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word "heirs," or "issue," is to be construed to mean heirs or issue living at the death of the person named as ancestor. But posthumous children are entitled to take the estate in the same manner as if born before the death of the parent; and any future estate depending upon the event of the death of a person without heirs, issue, or children, is defeated by the birth of a posthumous child of such person capable of taking by descent.[5] A similar rule

[1] Manice *v.* Manice, 43 N. Y. 303, 378–381.

[2] Mich. Comp. Laws, 1857, c. 85, §§ 15–26; 1871, c. 147, §§ 15–26; Wis. Rev. Stat. 1858, c. 83, §§ 15–26; Minn. Comp. Stat. 1859, c. 31, §§ 15–26; Stat. at Large, 1873, c. 32, §§ 15–26.

[3] Ohio, Rev. Stat. 1854, c. 42, § 1; 1860, c. 41, § 1.

[4] Miss. Code, 1857, c. 38, § 1, art. 3; 1871, c. 52, § 2286; Jordan *v.* Roach, 32 Miss. 481.

[5] N. Y. Rev. Stat. 4th ed. p. 133, §§ 22, 30, 31; Stat. at Large, vol. 1, p. 673, §§ 22, 30, 31. The same in Alabama. McRee's Adm'rs *v.* Means, 34 Ala. 378. "Remainder" includes executory devises, Ib.; Miller *v.* Macomb, 26 Wend. 229; Mich. Comp. Laws, 1857, c. 85, §§ 22, 30, 31; 1871, c 147, §§ 22, 30, 31;

prevails in Virginia and Tennessee, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it.[1] And, so far as limitations by devise extend, the same rule applies in North Carolina and New Jersey.[2]

In respect to *accumulation* of rents, income, and the like. In New York there may be an accumulation of rents and profits of real estate for the benefit of one or more persons, directed by any will or deed sufficient to pass real estate, if such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise. It must be made for the benefit of one or more minors then in being, and must terminate at the expiration of their minority. If the direction for such accumulation be for a longer time than during the minority of the persons intended to be benefited thereby, it will be void as respects the time beyond such minority.[3]

In Michigan, Wisconsin, and Minnesota, the same provisions are re-enacted in the sections of their respective compilations of laws above cited.

* In Alabama, no trust of estates for the purpose [*387] of accumulation only can have any force or effect for a longer term than ten years, unless when made for the benefit of a minor in being at the date of the conveyance, or, if by will, at the death of the testator; in which case the trust may extend to the termination of such minority.[4]

In Pennsylvania, trusts for the accumulation of rents and profits cannot be created for a longer term than the life or

Wis. Rev. Stat. 1858, c. 83, §§ 22, 30, 31; Minn. Comp. Stat. 1859, c. 31, §§ 22, 30, 31; Stat. at Large, 1873, c. 32, §§ 22, 30, 31; Stats. Geo. 1854, no. 62, p. 72; Code, 1873, p. 391, § 2251; Ala. Code, 1852, §§ 1302, 1303; 1867, §§ 1572, 1573; Ky. Rev. Stat. 1852, c. 80, § 9; Gen. Stat. 1873, c. 63, § 9; Miss. Rev. Code, 1857, c. 36, art. 8; 1871, c. 52, § 2291; Mo. Rev. Stat. 1855, c. 32, § 6; Stat. 1872, c. 140, § 6; 12 S. C. Stat. 299; Wood's Dig. (Cal. Laws) 1858, p. 105, §§ 3, 4; Code, 1872, §§ 739, 1071. See Powell *v.* Brandon, 24 Miss. 343; Jordan *v.* Roach, 32 Id. 481; Armstrong *v.* Armstrong, 14 B. Mon. 333.

[1] Va. Code, 1849, c. 116, § 10; 1873, c. 112, § 10; Tenn. Code, 1859, § 2009.

[2] N. C. Rev. Code, 1854, c. 43, § 8; Battle's Revisal, 1873, c. 42, § 3; Nix. Dig. (N. J. Laws) 1855, p. 877; 1868, p. 1032; Ex'rs of Condict *v.* King, 13 N. J. 375.

[3] N. Y. Rev. Stat. 4th ed. p. 135, §§ 37, 38; Stat. at Large, p. 675.

[4] Ala. Code, 1852, § 1310; 1867, § 1580.

lives of any grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator; that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation; and all other trusts for accumulation are void in so far as these limits are exceeded.[1]

[1] Purd. Dig. 5th ed. 1857, p. 701, § 9; 9th ed. 1861, p. 853, § 9; 1872, vol. 2, p. 1245, § 9.

CHAPTER VIII.

REVERSIONS.

1. Reversions defined.
2. Reversions may be conveyed as estates.
3. May exist after any number of estates less than a fee.
4. Of reversions under the statute *de donis*.
5. What reversion after a base fee.
6. There may be a reversioner in an estate for years, &c.
7. How reversioner is said to be seised.
8. How inheritance of a reversion is traced to one actually seised.
9. Reversioner of the estate for years is actually seised.
10. Rights incident to reversions.
11. Reversioner's remedy for waste.
12. Reversioner's interest in growing trees.
13. Rent incident to reversion.
14. Merger of reversion with prior estate.
15. Reversion not affected by disseisin of prior estate.
16. Fealty due to reversioner.
17. Reversion of estate granted to a corporation.
18. Devise of a subsequent estate to heirs.

1. Much of what is necessary to be understood in order to apply the doctrine of reversions has been anticipated in treating of remainders. In doing this, the susceptibility of estates of division into two or more estates, or lesser parts of a general estate, was considered, and the power in the original owner of parcelling these out by conveyances to various persons was explained. It will, therefore, be sufficient to define a reversion, as what remains to the owner of an estate after he has parted with a portion of it, the possession of what thus remains being to return or *revert* to him, upon the determination of the period for which the portion so parted with was to be enjoyed.[1] Consequently, * as to all the es- [* 389] tate in the lands, except the particular part so granted or devised, the original owner remains still the owner, in all respects, as he originally was. He has simply carved out of

[1] Watk. Conv. c. 16.

his original estate a temporary use and enjoyment of it; and when that has been served, he is in, as if no such grant had been made. This reversion, therefore, is a present vested estate, which the law creates or raises in his favor, and which has all the properties of the original estate held by him, except the right of present possession and enjoyment.

2. It may, accordingly, be conveyed by deed or devise, or will go to legal representatives of the reversioner if he dies intestate, though there was a technical difficulty at the common law in conveying it by feofment, since the reversioner is not in possession so as to make livery, unless the particular estate was for years, and the tenant consented to the livery. It required, therefore, to be done by grant, and, like other grants, could only be made by deed, even before the statute of frauds. And formerly it was requisite that the tenant of the particular estate should assent to the transfer, and this assent was called his *attornment*. But this is now done away with by statute 4 Anne, c. 16, § 9.[1] The reversion may be conveyed by any form of deed under the statute of uses, such as bargain and sale, covenant to stand seised, and lease and release; but it can no more be granted to commence *in futuro* than any estate in possession, though such an estate may be created to come into effect as a springing use.[2]

3. It is no matter how many estates are carved out of the owner's entire estate, a reversion will be left, provided these do not amount in quantity to his original estate. Thus the owner of a fee may grant twenty or more successive life-estates, and still retain his fee-simple of the land, though
[*390] his right of * possession will be suspended till these life-estates shall have been exhausted.[3]

4. It was upon this principle, that, after the statute *de donis*, there was always held to be a reversion in the grantor of an estate-tail, upon the idea that the succession of life-estates, which the successive tenants in tail were to enjoy, might at

[1] This statute is in force in Massachusetts, Pennsylvania, New York, Connecticut, and Alabama. Wms. Real Prop. 204, Rawle's note.

[2] Watk. Conv. 211, Coventry's note; Burt. Real Prop. §§ 39, 40; Jones *v.* Roe, 3 T. R. 93; 2 Cruise, Dig. 336; 1 Prest. Est. 89; Wms. Real Prop. 198, 199.

[3] 2 Cruise, Dig. 335.

some time cease, and no one have a right to claim the estate under the original limitation.[1]

5. It has been assumed, that, where one grants a base fee in land, there is no reversion remaining in him.[2] But if the determinability of the fee depend upon an event, which, by the laws of nature, must happen at some time, as an estate to A and his heirs, so long as a certain tree stands, it would seem that there would be a reversion in the grantor.[3] In one of the cases, the court call such an interest as this a "possibility of reverter;" but they all agree that it is not an interest which can be limited by way of remainder.[4] Whereas, if the estate were granted to A and his heirs till B returns from Rome, it would create a possibility of reverter, and not a reversion; for if B were to die at Rome, the estate in A would become absolute and indeterminable.[5] So if A sell land to a banking company, and they hold it till their charter expires, it will revert to him or his heirs. But such a right is not a reversion: it is a naked possibility of reverter which he could not convey or assign.[6]

6. Whatever estate a man may have, be it for years, for life, or in fee, if he parts with only a portion of it, the residue is in him as a reversion. Thus the owner of a fee may grant a life-estate, and a reversion is at once raised. If he gives an estate for years only, the reversion does not arise till the lessee enters; though if the estate for years is created by a conveyance deriving its effect from the statute of uses, the law gives the lessee possession without entry, and a reversion arises at once. Upon this principle, if a tenant in tail grant away a life-estate to another, he has a reversion. So if a tenant for life create an estate for years, he has a reversion left; and if a tenant for fifty years underlet for forty-nine, he has a reversion, as he would have though his own original estate exceeded but by a single day the estate which he parts with to his tenant.[7]

*7. A reversioner in fee, subject to an estate for [*391]

[1] 2 Cruise, Dig. 335.
[2] 2 Cruise, Dig. 335.
[3] *Ante*, vol. 1, p. *63; 1 Prest. Est. 440.
[4] Ayres *v.* Falkland, 1 Ld. Raym. 326.
[5] *Ante*, vol. 1, pp. *64, *65.
[6] Nicoll *v.* N. Y. & Erie R. R. Co., 2 Kern. 134.
[7] 2 Cruise, Dig. 335, 336

life or years, is technically said to be "seised of the reversion of the tenements as of fee and right," [1] though there can be no actual seisin thereof during the existence of the particular estate of freehold.[2] And such reversion, expectant upon an estate for life, vests, in Massachusetts and several of the States, by descent, in the heirs of the tenant in fee upon his decease, and their rights, as such heirs, will be governed by the law as it then existed, and not as it may be at the expiration of the life-estate, when the reversion becomes an estate in possession. Such reversioner may have waste against the tenant for life, or he may alien his interest, or mortgage or charge it with his debts.[3] And yet, if the widow or husband of the deceased ancestor takes dower or curtesy in the estate, it so far defeats the seisin of the heir as reversioner, that, if he dies during the continuance of the life-estate of the widow or husband, his own widow will not be entitled to dower out of the reversion when it shall come to be an estate in possession.[4]

8. From this particular nature of the seisin of the reversioner, nice and difficult questions of descent have arisen at common law, where one must trace his descent as heir from the ancestor who was last actually seised, in consequence of the rule that *seisina facit stipitem, non jus*. In Massachusetts, as above stated, this rule has been changed. But at common law, although each successive reversioner, to whom a reversion might have descended during the existence of the particular estate for life, to which it is subject, might convey it, devise it, or incumber it, or it might be levied on for his debt, and his grantee or devisee, or judgment creditor, would become a new stock of descent, yet, if no act of transfer of this kind took place before the reversioner died, the reversion [*392] would not necessarily * descend to his heirs, but would descend to whoever was then the heir of the person last seised, however far back it might be necessary to trace

[1] Wrotesley *v.* Adams, Plowd. 191; Moore *v.* Rake, 2 Dutch. 575, 589; Cook *v.* Hammond, 4 Mason, 484, 489; 2 Cruise, Dig. 336; *ante*, vol. 1, p. *38.

[2] Vanderheyden *v.* Crandall, 2 Denio, 9.

[3] Miller *v.* Miller, 10 Met. 393; Cook *v.* Hammond, 4 Mason, 467; Marley *v.* Rodgers, 5 Yerg. 217. See *post*, Descent, § 2, pl. 26.

[4] *Ante*, vol. 1, p. *209, pl. 29; Cook *v.* Hammond, 4 Mason, 485.

the descent to find who had been so seised, and who was his lineal heir. This subject is discussed and explained by Story, J., and Shaw, C. J., in the cases of Cook *v.* Hammond, and Miller *v.* Miller, above cited.[1] If, however, the reversioner shall have acquired his title by purchase, he, of course, becomes a new stock of descent, and his heirs take irrespective of any anterior owner.[2] But it must be understood, that the exclusion of a mesne reversioner as a stock of descent, because not actually seised, only applies where the particular estate is a freehold; for if it be an estate for years only, the reversioner would be deemed to be actually seised, so as to make a new *stirps*.[3] But the law in this respect is now changed by statute in many of the States besides Massachusetts, and among them New York, Virginia, North Carolina, Tennessee, Rhode Island, Pennsylvania, Connecticut, Delaware, South Carolina, Georgia, and Ohio, for which the reader is referred to the several statutes upon the subject collected at the end of the chapter on Descents, in the next volume.[4]

9. In accordance with the principle above stated, that a reversioner in fee expectant upon an estate for years is deemed to be actually seised, the wife or husband of such reversioner will be entitled to dower or curtesy in the same manner as if the reversioner were in actual possession, subject, of course, to the estate for years, if it was created before the marriage, or the reversion were acquired by purchase or descent during coverture.[5]

10. Among the powers and rights incident to a reversion, and which pass with it to whomsoever it may come by descent, purchase, or devise, are, first, a right to maintain an action for * an injury done to the inheritance, [*393] such as cutting trees, impairing houses, and the like, whether done by the tenant or a stranger; second, a right to receive accruing rents upon a demise of the premises in respect to which the reversion exists. If the act injurious

[1] See also 4 Kent, Com. 385. Cook *v.* Hammond, 4 Mason, 467; Miller *v.* Miller, 10 Met. 393.

[2] 4 Kent, Com. 386.

[3] Co. Lit. 15 a; 4 Kent, Com. 386.

[4] See *post*, Descent, § 2, pl. 26.

[5] 2 Cruise, Dig. 338; *ante*, vol. 1, pp. *37, *154, pl. 6.

to the inheritance be done by a stranger, both the tenant and the reversioner may have separate actions, each according to the injury done to their respective interests which are thereby affected, the action by the tenant being trespass, that of the reversioner being case,[1] though now, by statute, in New York, a reversioner may have waste against the tenant, or trespass against a stranger doing injury to the inheritance.[2]

11. To protect the rights of those having reversionary interests in land from tortious acts by the tenants, which injuriously affect the inheritance, the statutes of Marleberge and Gloucester provided a remedy by an action of waste, whereby the party entitled to the inheritance recovered damages, and the place wasted. And besides this, he might maintain an action on the case in the nature of waste. In most of the States, this matter is regulated, both as to the right and remedy, by statute, or an entire or partial adoption of the common law, as will appear by a reference to the first volume.[3]

12. A reversioner has such a property in growing trees, although the premises are in the possession of a tenant for life, that if the tenant or a stranger cut them without right, as in a case where timber-trees are cut by a tenant, they become at once, as soon as severed, the personal property of the reversioner, who may recover for them accordingly if carried away.[4] And yet a reversioner, entitled to land only upon the determination of a life-estate, has no right to authorize the cutting of trees during the term for life.[5]

[*394] *13. In respect to the recovery of rent by the owner of the reversion, as the law stood prior to 32 Hen. VIII., c. 34, where one made a lease reserving rent, and took a covenant for the payment thereof from the lessee, and then conveyed his reversion to a stranger, the purchaser had no remedy upon such covenant except in the name of the covenantee, nor could he avail himself of any condition in the

[1] Jesser *v.* Gifford, 4 Burr. 2141; 4 Kent, Com. 355; Little *v.* Palister, 3 Me. 6; Bartlett *v.* Perkins, 13 Me. 87; Jackson *v.* Pesked, 1 M. & S. 234; Ripka *v.* Sergeant, 7 W. & S. 9; *ante*, vol. 1, pp. *117, *118; Wood *v.* Griffin, 46 N. H. 239.

[2] Livingston *v.* Haywood, 11 Johns. 429.

[3] Vol. 1, pp. *107–*126.

[4] Richardson *v.* York, 14 Me. 216.

[5] Simpson *v.* Bowden, 33 Me. 549.

lease to defeat the same by entry. But by the thirty-fourth chapter of the statutes of that year, a like remedy is given to assignees of a reversion as the reversioner himself had, for the recovery of rent, or for the breach of any covenant or condition in a lease by the lessee or his assigns.[1] Where there is a demise, therefore, of an estate, reserving rent, the right to recover this rent is incident to the reversioner in whosoever hands it may be, unless the rent shall have been severed or granted away by itself by a reversioner. If, therefore, a reversioner granted his reversion, either by absolute deed or by mortgage, with no exception as to rent, the assignee may recover for any rent accruing due after such assignment made. But rent already due is a chose in action, and does not pass with the reversion.[2]

14. If the reversion and the particular estate on which it depends become united in the same person by the same right, without any intervening interest, the particular estate merges in the reversion; or, in other words, the reversion becomes an estate in possession by removing or extinguishing that which interposed between the right and the enjoyment in the reversion. Such would be the effect, and by the same course of operation, if, instead of the reversion being a freehold, and the particular estate a term for years, they were both terms for years. And even if the particular estate were for a larger number of years than the reversion, it would, nevertheless, be merged or extinguished by the union of the two in the same person, and the shorter term in reversion would alone remain.[3]

*15. It is a familiar principle, that by a disseisin, [*395] followed by an adverse possession, for the time fixed by statute as the period of limitation, a title may be acquired to land, to the exclusion even of him who had an incontestable title. But as this applies only as against one who has an immediate right of entry, whereby to regain the seisin and

[1] *Ante*, vol. 1, p. *218.

[2] Burden *v.* Thayer, 3 Met. 76; Wms. Real Prop. 203; Condit *v.* Neighbor, 1 Green, 83; Co. Lit. 143 a.

[3] *Ante*, vol. 1, pp. *354, *355, where the subject is considered at length; Watk. Conv. ed. 1838, 214; 2 Flint, Real Prop. 314; Hooker *v.* Utica T. Co., 12 Wend. 373.

possession so lost, if the tenant of the particular estate be dispossessed of the estate, the reversioner is not thereby affected, nor does the statute of limitations begin to run until he acquires a right of entry by a natural determination of the particular estate. Nor will the reversioner be affected by a descent cast; that is, by the disseisor dying seised, and his estate descending to his heir during the continuance of the particular estate.[1]

16. It should be remarked, that, theoretically, fealty is always due from the tenant of the particular estate to the holder of the reversion, as being always inseparable from the reversion, and not like rent, which, though a usual incident to a reversion, is not an inseparable one. For the rent may be granted away, reserving the reversion, or the reversion reserving the rent, if done by special words.[2]

17. In one case, a reversion operates like the feudal doctrine of escheat; and that is, where there has been a grant of a fee to a corporation which is dissolved without having granted away the estate. It will then revert to the grantor in the same way as lands escheat to the lord where the tenant dies without heirs.[3] But, in New York, the court make a distinction between lands taken for a turnpike, whereby the corporation get only an easement which determines with a discontinuance of the turnpike, and a *grant* of land to a plank-road corporation, which does not revert to the grantor upon a dissolution of the company. In the one case there is a possibility of reverter to the original owner; in the other there is none.[4]

18. At common law, if a man seised of an estate limited it to one for life, remainder to his own right heirs, they would take, not as remainder-men, but as reversioners; and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away [*396] the reversion. * And where he made the limitation

[1] Jackson *v.* Schoonmaker, 4 Johns. 390, where the particular estate was one for life; 2 Crabb, Real Prop. 983. See Washburn, Easements, 110; 3d ed. 160.

[2] Co. Lit. 143 a; Wms. Real Prop. 199; 2 Flint, Real Prop. 311; Watk. Conv. ed. 1838, 213; *ante*, p. *7.

[3] 2 Prest. Est. 50, 51.

[4] Heath *v.* Barmore, 50 N. Y. 302.

after a life-estate to his own heirs by will, they took as reversioners, and not as purchasers.[1] But by the statute 3 and 4 Wm. IV. c. 106, § 3, a devise to an heir takes effect as such, though it be of the same estate he would otherwise have inherited.

[1] Gilbert, Uses, Sugd. ed. 32 and note; 4 Kent, Com. 506.

APPENDIX.

For the convenience of the reader, portions of some of the more important early statutes, referred to in the foregoing work, have been added by the way of Appendix thereto; they being such as are understood as forming a part of the common law of most, if not all, of the States.

Magna Charta, 9 Henry III. c. 7, a. d. 1225.

A widow, after the death of her husband, incontinent, and without any difficulty, shall have her marriage and her inheritance, and shall give nothing for her dower, or her marriage or her inheritance, which her husband and she held the day of the death of her husband; and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before), or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell until her dower be to her assigned, as it is aforesaid; and she shall have in the mean time her reasonable estovers of the common; and for her dower shall be assigned unto her the third part of all of the lands of her husband, which were his during coverture, except she were endowed of less at the church-door.

Statute of Marleberge, 52 Henry III. c. 23, a. d. 1267.

Also fermors, during their terms, shall not make waste, sale, nor exile, of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

Statute of Gloucester, 6 Edward I. c. 5, a. d. 1278.

It is provided also, that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste shall *leese* the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. And for waste made *in the time of wardship, it shall be done as is contained in the [*608] Great Charter. And where it is contained in the Great Charter that he which did waste during the custody shall *leese* the wardship, it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship.

Statute of Westminster 2d, 13 Edward I. c. 1, a. d. 1285.

De donis conditionalibus.

1. First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that, if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. In case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that, if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir. In case also where one giveth land to another, and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that, their will being expressed in the gift, was not heretofore, nor yet is, observed. In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition), heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died; yet, by the deed and feofment of them (to whom the land was so given upon condition), the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift.

2. Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all), or if any issue be, and fail by death, or heir of the body of such issue failing. Neither shall the second husband of any such woman, from henceforth, have any thing in the land so given upon condition, after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife (to whom the land was so given) it shall come to their issue, or
[*609] return unto the giver, or his heir, as before is said. And forasmuch *as in a new case new remedy must be provided, this manner of writs shall be granted to the party that will purchase it.

Statute of Westminster 3d, 18 Edward I. c. 1, 2, 3, a. d. 1290.

Quia Emptores.

Chap. 1. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to

their fees; which thing seemed very hard and extreme unto those lords and other great men, and moreover in this case manifest disinheritance: Our lord the king, in his parliament at Westminster, after Easter, the eighteenth year of his reign, that is to wit, in the quinzime of St. John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before.

Chap. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth, or ought to pertain, to the said chief lord for the same parcel, according to the quantity of the land or tenement so sold. And so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold for the parcel of the service so due.

Chap. 3. And it is to be understood, that by the said sales or purchases of lands or tenements, or any parcels of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit, that this statute extendeth but only to lands holden in fee-simple.

Statute 32 Henry VIII. c. 34, a. d. 1540.

Concerning Grantees of Reversions to take Advantage of the Conditions to be performed by the Lessees.

1. Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters-patent of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, * or by any other means [*610] come to the king's hands since the said fourth day of February, the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being grantees or assignees to or by our said sovereign lord the king, or to or by any other person or persons than the king's highness, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers and grantees, their executors, administrators, and assigns, as the

said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form as if the reversion of such lands, tenements, or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters-patents had been made by his highness.

2. Moreover, be it enacted by authority aforesaid, that all farmers, lessees, and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy against all and every person and persons and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the king our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them, might and should have had against the said lessors and grantors, their heirs and successors; all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.

END OF VOL. II.

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